TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1910.

No. [redacted] 77.

THE UNITED STATES, PETITIONER,

vs.

CARL S. CHAMBERLIN, D. H. RICE, AND TYSON S. DINES, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF WINFIELD SCOTT STRATTON, DECEASED.

ON WRIT OF CERTIORARI TO THE UNITED [redacted]TES CIRCUIT COURT OF APPEALS FOR THE EIGH[redacted]IRCUIT.

PETITION FOR CERTIORARI FILED OCTOBER 10, 1910.
CERTIORARI AND RETURN FILED NOVEMBER 4, 1910.

(21367)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 571.

THE UNITED STATES, PETITIONER,

vs.

CARL S. CHAMBERLIN, D. H. RICE, AND TYSON S. DINES, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF WINFIELD SCOTT STRATTON, DECEASED.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

INDEX.

1 Pleas in the District Court of the United States for the District of Colorado
Sitting at Denver.

Be it remembered, that heretofore and on to-wit, the twenty-fifth day of January, A. D., 1905, came The United States of America, by Earl M. Cranston, Esquire, United States Attorney, and filed in said court its complaint and sued out of and under the seal of the said court a writ of summons against Carl S. Chamberlin, D. H. Rice, and Tyson S. Dines as the executors of the last will and testament of Winfield Scott Stratton, deceased.

And the said complaint is in words and figures as follows to-wit:

United States of America,
District of Colorado—ss.

In the District Court.

The United States of America, Plaintiff,
vs.
Carl S. Chamberlin, D. H. Rice and Tyson S. Dines, as the Executors of the last will and testament of Winfield Scott Stratton, deceased, Defendants,

Complaint.

2 Comes now the United States of America, by Earl M. Cranston, United States Attorney for the District of Colorado, and for cause of action against the said named defendants as executors as aforesaid, alleges:

First: That on or about, to-wit, the 23rd day of May, A. D. 1899, one Winfield Scott Stratton, then a resident of the County of El Paso in the State and District of Colorado, sold to a corporation known as Stratton's Independence Limited, organized under the laws of Great Britain, certain lands situate in the Cripple Creek Mining District in the County of Teller in the State and District of Colorado, viz: the "Independence" and the "Prof. Lamb" lode mining claims United States Survey No. 7409, the "May Raymond" lode mining claim, United States Survey No. 8193 the "Madison" lode mining claim, United States Survey No. 8204, the "Washington" lode mining claim, United States Survey No. 7485, the "Maggie" lode mining claim United States Survey No. 8506, the "Buckeye" lode mining claim, United States Survey No. 8929, the "White House No. 1"

lode mining claim, United States Survey No. 8903, the "Corrigan Chief" and the "Ashland" lode mining claims and the "Blanche" placer mining claims, United States Survey No. 7694, the "Smuggler No. 2" lode mining claim, United States survey No. 8485, the "Wilson Creek Contact" lode mining claim, United States survey No. 7486 (excepting a certain portion thereof in conflict with the "Strong" lode mining claim), certain portions of the "Cyclone" lode mining claim United States
3 Survey No. 8673, a portion of the "Four Queen" lode mining claim, United States Survey No. 8897, the "Wilson Creek" placer mining claim, United States Survey No. 8427, the whole of said premises sold being known as the "Independence Group" of mines, being located on Battle Mountain in the said mining district, and thereupon in consummation of said sale the said Winfield Scott Stratton on or about the 23rd day of May, A. D. 1899, executed, acknowledged and delivered his certain deed wherein and whereby he granted, bargained, sold and conveyed unto said corporation and its successors and assigns the said described premises, together with certain plants, pipe lines, machinery, tools, fixtures, appliances and other property used in connection with said premises and subject to certain rights and agreements in said deed specified.

Second: That the said deed recited the consideration therefor to be the sum of four million eight hundred and fifty thousand dollars ($4,850,000) and that internal revenue stamps of the United States to the value of $4,850.00 were attached to said instrument and cancelled.

Third: That the true and actual consideration for the said conveyance and the premises thereby sold and transferred was not the sum of $4,850,000.00 as therein recited, but that the true and actual consideration therefor was certain shares of corporate stock of the full aggregate and actual value of nine million seven hundred and thirty-three thousand dollars ($9,-
4 733,000.00, and that the said premises so by said deed sold and conveyed were at the time of said conveyance thereof of the full value of last named amount.

Fourth: That thereupon by reason of and on account of said conveyance there became due and payable to the plaintiff herein and collectible by it from the said Winfield Scott Stratton under and by virtue of the provisions of the Act of Congress entitled "An Act to Provide Ways and Means to meet War Expenditures, and for other Purposes," approved June 13th, A. D. 1898, a revenue tax in the sum of $9,733.00, and that no part thereof was paid to or collected by the plaintiff herein, save the sum of $4,850.00, the value of the stamps attached to said instrument as aforesaid and that the balance of the sum so due as

aforesaid, to-wit; four thousand eight hundred and eighty-three dollars ($4,883.00) has at no time been paid to the plaintiff nor any part thereof, and that no revenue stamps were at any time attached to or cancelled on account of said instrument except stamps to the value of $4850.00, as hereinbefore set forth.

Fifth: That the Collector of Internal Revenue of the United States for the District of Colorado duly submitted to the Commissioner of Internal Revenue of the United States a full report of the facts and circumstances connected with said deed and the amount of revenue tax due therefor and thereon,
5 and that after due consideration the said Commissioner of Internal Revenue determined that the full sum of nine thousand eight hundred thirty-three dollars ($9,833.00) should have been and should be paid and collected as a revenue tax on account of said deed of conveyance under the provisions of said Act of Congress.

Sixth: That said Winfield Scott Stratton departed this life on or about, to-wit, September 14th, 1902, leaving a last will and testament wherein and whereby the defendants hereinabove named, Carl S. Chamberlin, D. H. Rice and Tyson S. Dines, were named as the executors thereof. That thereafter and on or about to-wit, December 29th, 1902, the said last will and testament was duly admitted to probate in and by the County Court in and for the County of El Paso, in the said State and District of Colorado, and that on or about said last named date the said named defendants were by said court duly appointed as the executors of said last will and testament. That thereupon the said defendants qualified as such executors and ever since have been, and now are, the duly appointed, qualified and acting executors of the last will and testament of Winfield Scott Stratton, deceased.

Seventh: That demand has been made upon the said named defendants as executors as aforesaid for the payment to the plaintiff of the sum of four thousand eight hundred and
6 eighty-three dollars ($4,883.00) the balance of the revenue tax due as aforesaid upon said deed of conveyance, but they have at all times failed and refused to pay such balance, or any part thereof, and that thereupon the said Commissioner of Internal Revenue of the United States directed suit to be instituted on behalf of the plaintiff herein for the collection of the said balance of revenue tax.

Wherefore plaintiff prays judgment against the defendants Carl S. Chamberlin, D. H. Rice and Tyson S. Dines, as the executors of the last will and testament of Winfield Scott Stratton,

deceased, in the sum of four thousand eight hundred and eighty-three dollars, ($4,883.00), together with legal interest thereon from the date hereof, and the costs herein to be taxed.

EARL M. CRANSTON,
United States District Attorney

the District of Colorado.

Endorsed: 1882. In the District Court of the United States. The United States of America, plaintiff, vs. Carl S. Chamberlin, D. H. Rice, and Tyson S. Dines, as the Executors of the last will and testament of Winfield Scott Stratton, deceased, defendants. Complaint. Filed Jan. 25, 1905, Charles W. Bishop, Clerk.

United States of America,
District of Colorado—ss.

In the District Court of the United States for the District of Colorado.

7 The United States of America, Plaintiff,

vs.

Carl S. Chamberlin, D. H. Rice, and Tyson S. Dines, as the Executors of the last will and testament of W. S. Stratton, deceased, defendants.

Complaint filed in the Clerk's office at Denver, this 25th day of January, A. D., 1905.

The President of the United States of America, To Carl S. Chamberlin, D. H. Rice, and Tyson S. Dines, as Executors etc:—Greeting:

You and each of you are hereby notified that an action has been brought in said Court, by the United States of America, plaintiff, against you as defendants to recover the sum of four thousand eight hundred and eighty-three dollars ($4,883) the same being due to plaintiff from defendants for balance of Internal Revenue tax on a certain deed to mining property in the district of Colorado, known as the "Independence Group" of mines conveyed by Winfield Scott Stratton to a corporation known as Stratton's Independence Limited on the 23rd day of May, 1899, and for the costs of suit and interest, as more particularly set forth and described in the complaint filed herein and to which reference is here made.

You are hereby required to appear and demur or answer to the complaint filed in said action, in said court, within thirty days (exclusive of the day of service) after this summons
8 shall be served on you; and if you fail so to do, the said plaintiff will take judgment against you by default ac-

cording to the prayer of the said complaint, and will apply to the court for the relief demanded therein.

Witness The Honorable Moses Hallett, Judge of the District Court of the United States, for the District of Colorado, and the seal of said Court, at the City and County of Denver, in said District, this 25th day of January, A. D. 1905, and of the independence of the United States the 129th year.

(Seal of Court). CHARLES W. BISHOP, Clerk.

Proof of Service.

United States of America,
District of Colorado,—ss.

Denver, Colo., Jan 27th, A. D., 1905.

I hereby certify that I received the within writ on the 26th day of January, A. D., 1905, and that I have personally served the same upon the defendants by delivering a true copy of the within writ to Carl S. Chamberlin at Colorado Springs on the 27th day of January, 1905, and to D. H. Rice at Colorado Springs on the 27th day of January, 1905. As to Tyson S. Dines at Denver, on the 27th day of March, A. D., 1905.

9 This writ therefore, returned this 27th day of March, A. D., 1905.

DEWEY C. BAILEY, Marshal.
By EDWIN H. DAVIS,
and W. L. GREINER,
Deputy Marshals.

Endorsed: No. 1882: District Court United States District of Colorado: The United States of America, plaintiff, versus Carl S. Chamberlin, D. H. Rice, and Tyson S. Dines, as the Executors of the last will and testament of Winfield Scott Stratton, deceased, defendants: Summons: Filed Mar. 27, 1905, Charles W. Bishop, Clerk. Earl M. Cranston, Attorney of the United States.

United States of America,
District of Colorado,—ss.

In the District Court.
The United States of America, Plaintiff,
vs.
Carl S. Chamberlin, D. H. Rice, and Tyson S. Dines as Executors of the last will and testament of Winfield Scott Stratton, deceased Defendants.

Demurrer.

Come now the above named defendants Carl S. Chamberlin, D. H. Rice and Tyson S. Dines, as Executors of the last will and testament of Winfield Scott Stratton, deceased, by their attorneys and demur to the complaint of the plaintiff in this cause and for grounds of said demurrer show and allege.

First: That the said complaint does not state a cause of action against these defendants or any of them within the jurisdiction of this court, as will appear upon the face of the complaint.

Second: That the said complaint does not state facts sufficient to constitute a cause of action againt these defendants or any of them.

Third: That the plaintiff has not alleged facts in said complaint which entitle it to recover against these defendants.

Wherefore these defendants demur and pray judgment of the court for their costs,

McALLISTER & GANDY,
Attorney for the defendants.

Endorsed: No. 1882. United States District Court. District of Colorado. The United States of America, plaintiff, vs. Carl S. Chamberlin, et al, defendants. Demurrer of Defendants. Filed Feb. 23, 1905, 8.55 a. m. Charles W. Bishop, Clerk. McAllister and Gandy, Attorneys and Counselors, Suite 512 Mining Exchange Building, Colorado Springs, Colorado.

11 Sixty-Seventh Day, November Term, Thursday, February 15th, A. D. 1906.

Present: The Honorable John A. Riner, Judge of the District Court of the United States for the District of Wyoming, assigned to the District of Colorado and other officers as noted on the seventh day of November, A. D. 1905.

The United States of America,
vs. 1882
Carl S. Chamberlin, D. H. Rice and Tyson S. Dines, as the Executors of the last will and testament of Winfield Scott Stratton, deceased,

For collection of Revenue Tax.

At this day comes the plaintiff by Earl M. Cranston, Esquire district attorney, and the demurrer to the complaint herein having heretofore come on to be heard and having been argued

by Earl M. Cranston, Esquire, district attorney, and by Elmer E. Whitted, Esquire, attorney for the defendant and having been taken under advisement and the court having considered the same and being now fully advised in the premises it seemeth to the court now here that the complaint herein is not sufficient in law to be answered unto and so the demurrer is hereby sustained.

Wherefore it is considered by the Court that this case be and the same is hereby dismissed out of this court and that the defendants go hence hereof without day.

12 United States of America,
District of Colorado—ss.

In the District Court.

The United States of America, Plaintiff,
vs. No. 1882.
Carl S. Chamberlin, D. H. Rice, and Tyson S. Dines, as the the Executors of the Last Will and Testament of Winfield Scott Stratton, deceased, Defendants.

Petition for Writ of Error.

And now comes The United States of America, the plaintiff above named, and says that on or about the 15th day of February, A. D. 1906, this court entered judgment herein in favor of the defendants and against this plaintiff, in which judgment as well as in the proceedings had prior thereto in this cause certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this plaintiff prays that a writ of error may issue in this behalf for the review and correction of the said judgment and proceedings by the United States Circuit Court of Appeals for the eighth circuit, and that a transcript of the record and proceedings and papers in this cause, duly authenticated, may be sent to the said circuit court of appeals.

13 EARL M. CRANSTON,
United States Attorney.

ERNEST KNAEBEL,
Assistant United States Attorney,
Attorneys for the plaintiff.

Endorsed: No. 1882. In the United States District Court. District of Colorado. The United States of America, plaintiff, vs. Carl S. Chamberlin, D. H. Rice, and Tyson S. Dines, as the Executors of the Last Will and Testament of Winfield Scott Stratton, deceased, defendants. Petition for Writ of

Error. Filed Mar. 6, 1906. Charles W. Bishop, Clerk. Earl M. Cranston, U. S. Attorney, Ernest Knaebel, Asst. U. S. Attorney.

United States of America,
District of Colorado—ss.

In the District Court.

The United States of America, Plaintiff,
vs. No. 1882.
Carl S. Chamberlin, D. H. Rice, and Tyson S. Dines, as the Executors of the last Will and Testament of Winfield Scott Stratton, deceased, Defendants.

Assignment of Errors.

Comes now the plaintiff in the above entitled cause and makes the following assignment of errors, which it avers occurred in the record and proceedings herein, viz:

14 1. The court erred in sustaining the demurrer of the defendants to the plaintiff's complaint.

2. The court erred in rendering judgment against the plaintiff and in favor of the defendants.

Wherefore, the plaintiff prays that the judgment herein of the District Court of the United States for the District of Colorado, be reversed.

EARL M. CRANSTON,
United States Attorney.

ERNEST KNAEBEL,
Assistant United States Attorney,
Attorneys for the plaintiff.

Endorsed: No. 1882. In the United States District Court. District of Colorado. The United States of America, plaintiff, vs. Carl S. Chamberlin, D. H. Rice, and Tyson S. Dines, as the Executors of the Last Will and Testament of Winfield Scott Stratton, deceased, defendants. Assignment of Errors. Filed Mar. 6, 1906. Charles W. Bishop, Clerk. Earl M. Cranston, U. S. Attorney, Ernest Knaebel, Asst. U. S. Attorney.

The United States of America.

15 United States of America,
District of Colorado—ss.

The President of the United States of America: To the Honorable, the Judge of the United States District Court, for the District of Colorado, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said District

Court, before you at the November Term, 1905, thereof, between The United States of America, Plaintiff, and Carl S. Chamberlin, D. H. Rice and Tyson S. Dines, as the Executors of the Last Will and Testament of Winfield Scott Stratton, deceased, defendants, a manifest error hath happened, to the great damage of the said plaintiff as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, Do Command You, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforsaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Eighth Circuit, together with this writ, so that you have the said record and proceedings aforesaid at the City of St. Louis, Missouri, and filed in the office of the Clerk of the United States Circuit Court of Appeals, for the Eighth Circuit, on or before the fifth day of May, 1906, to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, The Honorable Moses Hallett, Judge of the District Court of the United States for the District of Colorado, this sixth day of March, in the year of our Lord, one thousand nine hundred and six and of the Independence of the United States the 130th year.

Seal
United States
District Court
District of Colorado

Issued at office in the City and County of Denver, in said District, with the seal of the United States District Court, for the District of Colorado, and dated as aforesaid.

CHARLES W. BISHOP,
Clerk United States District Court, District of Colorado.

Allowed: By MOSES HALLETT, Judge.

Return.

The United States of America,
District of Colorado—ss.

In obedience to the command of the within Writ, I herewith transmit to the Honorable, The United States Circuit Court of Appeals a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

Seal
United States
District Court
District of Colorado

In Witness Whereof, I hereunto subscribe my name, and affix the seal of said United States District Court, for the District of Colorado, at the City and County of Denver, in said District, this Second day of April, 1906.

CHARLES W. BISHOP, Clerk.
By ..... Deputy Clerk.

District of Colorado—ss.

The plaintiff in error, having served this writ, by lodging a copy thereof in the Clerk's office where the record remains, and having given the security required by law, on the issuing of the citation, within the time required by law, this writ therefore becomes a supersedeas.

In Witness Whereof, I hereunto subscribe my name, and affix the seal of said United States Circuit Court, for the District of Colorado, at the City and County of Denver, in said District, this .... day of ..... A. D. 190..

..... Clerk.

No. 1882. United States Circuit Court of Appeals. Eighth Circuit. The United States of America, Plaintiff in Error, vs. Carl S. Chamberlin, D. H. Rice, and Tyson S. Dines, as the Executors of the Last Will and Testament of Winfield Scott Stratton, deceased, Defendants in Error. Writ of Error. To U. S. District Court, District of Colorado. Filed Mar. 6, 1906. Charles W. Bishop, Clerk. Earl M. Cranston, Attorney for Plaintiff in Error.

16 United States of America,
Eighth Judicial Circuit—ss.

In the United States Circuit Court of Appeals for the Eighth Judicial Circuit.

The United States of America: To Carl S. Chamberlin, D. H. Rice, and Tyson S. Dines, as Executors of the Last Will and Testament of Winfield Scott Stratton, deceased, Greeting.

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the eighth circuit, at the City of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the district of Colorado, sitting at Denver, wherein The United States of America is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error,

as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, The Honorable Moses Hallett, Judge of the District Court of the United States for the District of Colorado, this 6th day of March, A. D. 1906.

MOSES HALLETT, Judge.

Return on Service of Writ.

United States of America,
District of Colorado—ss.

I hereby certify and return that I served the annexed Citation on the therein-named Carl S. Chamberlin, D. H. Rice and Tyson S. Dines by handing to and leaving a true and correct copy thereof with E. E. Whitted, their attorney, personally at Denver in said District in the seventh day of March, A. D. 1906.

D. C. BAILEY, U. S. Marshal.
By D. C. Bailey, Jr., Deputy.

2406. No. 1882. United States Circuit Court of Appeals. Eighth Circuit. The United States of America, Plaintiff, vs. Carl S. Chamberlin, D. H. Rice and Tyson S. Dines, as the Executors of the Last Will and Testament of Winfield Scott Stratton, deceased, Defendants. Citation. Filed Mar. 7, 1906. Charles W. Bishop, Clerk. Earl M. Cranston, Attorney for plaintiff.

17 United States of America,
District of Colorado—ss.

I, Charles W. Bishop, Clerk of the District Court of the United States for the District of Colorado, do hereby certify the above and foregoing to be a true, perfect and complete transcript and copy of the record, petition for appeal, assignments of error, and all proceedings in the case, heretofore filed or entered of record in said court and in a certain cause in said court lately pending wherein The United States of America was plaintiff and Carl S. Chamberlin, D. H. Rice, and Tyson S. Dines, as the Executors of the Last Will and Testament of Winfield Scott Stratton, deceased, were defendants, as fully and completely as the same still remain on file and of record in my office at Denver.

In Testimony to the above I do hereunto sign my name and affix the seal of said court at the City and County of Denver, in said district this second day of April, A. D. 1906.

Seal
United States
District Court
District of Colorado

CHARLES W. BISHOP, Clerk.

Filed April 4, 1906. John D. Jordan, Clerk.

12 (Clerk's Certificate to Printed Record.)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing printed record in the case of The United States of America, Plaintiff in Error, v. Carl S. Chamberlin, D. H. Rice and Tyson S. Dines, as Executors of the last will and testament of Winfield Scott Stratton, deceased, was printed under my supervision and is identical with the printed record upon which said cause was heard and decided in said Circuit Court of Appeals.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this thirtieth day of September, A. D. 1908.

(Seal) JOHN D. JORDAN
Clerk of the United States Circuit Court of Ap-
1 peals for the Eighth Circuit.

Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the September Term 1907, of said Court, begun and held at the United States Court House in the City of Denver, Colorado, on the first Monday in September, to-wit: the second day of September, A. D. 1907, and which said September Term, 1907, was adjourned from the City of Denver, Colorado, to the City of St. Paul, Minnesota, as provided by law, before the Honorable Walter H. Sanborn and the Honorable William C. Hook, Circuit Judges, and the Honorable John F. Philips, District Judge.

Attest:

(Seal) JOHN D. JORDAN
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it Remembered that heretofore, to-wit: on the fourth day of April, A. D. 1906, a transcript of record pursant to a writ of error directed to the District Court of the United States for the District of Colorado was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein The United States of America was Plaintiff in Error, and Carl S. Chamberlin, D. H. Rice and Tyson S. Dines, as Executors of the last will and testament of Winfield Scott Stratton, deceased, were

Defendants in Error, which said transcript of record was filed and docketed in said Circuit Court of Appeals as No. 2422.

That thereafter the following proceedings were had in said cause, in said Circuit Court of Appeals, viz:

2 (Appearance of Mr. Earl M. Cranston and Mr. Ernest Knaebel, as Counsel for Plaintiffs in Error.)

On the sixteenth day of April, A. D. 1906, the appearance of Mr. Earl M. Cranston and Mr. Ernest Knaebel, as counsel for the plaintiff in error, was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

The United States of America, Plaintiff in Error,
No. 2422. vs
Carl S. Chamberlin, et al., as Executors &c.

The Clerk will enter our appearance as Counsel for the Plaintiff in Error.

EARL M. CRANSTON.
United States Attorney for the District of Colorado.
ERNEST KNAEBEL,
Special Assistant United States Attorney.

Endorsed: U. S. Circuit Court of Appeals, Eighth Circuit No. 2422. The United States of America, Plaintiff in Error, vs. Carl S. Chamberlin, et al., as Executors &c. Appearance. Filed Apr. 16, 1906, John D. Jordan, Clerk. Earl W. Cranston, Ernest Knaebel, Counsel for Plaintiff in Error.

(Appearance of Mr. Henry McAllister, Mr. N. S. Gandy and Mr. E. E. Whitted, as Counsel for Defendants in Error.)

And on the eighteenth day of June, A. D. 1906, the appearance of Mr. Henry McAllister, Mr. N. S. Gandy and Mr. E. E. Whitted, as counsel for the defendants in error, was filed in said cause, in the words and figures following, to-wit:

3 United States Circuit Court of Appeals, Eighth Circuit.

The United States of America, Plaintiff in Error,
No. 2422. vs.
Carl S. Chamberlin, et al., Executors &c.

The Clerk will enter my appearance as Counsel for the Defendants in Error.

HENRY McALLISTER,
N. S. GANDY,
E. E. WHITTED.

(Endorsed): U. S. Circuit Court of Appeals, Eighth Circuit. No. 2422. The United States of America, Plff. in Error, vs. Carl S. Chamberlin, et al., Executors &c. Appearance. Filed Jun. 18, 1906, John D. Jordan, Clerk. Henry McAllister, N. S. Gandy, E. E. Whitted, Counsel for Defts. in Error.

(Appearance of Mr. Tyson S. Dines, as Counsel for Defendants in Error.)

And on the tenth day of December, A. D. 1906, the appearance of Mr. Tyson S. Dines, as counsel for the defendants in error, was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

The United States of America, Plaintiff in Error,
No. 2422. vs.
Carl S. Chamberlin, et al., Executors &c.

The Clerk will enter my appearance as Counsel for the Defendants in Error.

TYSON S. DINES.

(Endorsed): U. S. Circuit Court of Appeals, Eighth Circuit. No. 2422. The United States of America, Plaintiff in Error, vs. Carl S. Chamberlin, et al., as Executors &c. Appearance. Filed Dec. 10, 1906, John D. Jordan, Clerk. Tyson S. Dines, Counsel for Defts. in Error.

4 (Order of Submission.)

And on the tenth day of December, A. D. 1906, in the record of the proceedings of said Circuit Court of Appeals is an order of submission in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

December Term, 1906. Monday, December 10, 1906.

The United States of America, Plaintiff in Error,
No. 2422. vs.
Carl S. Chamberlin, et al., Executors &c.

In Error to the District Court of the United States for the District of Colorado.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Earl M. Cranston in behalf of the plaintiff in error; continued by Mr. Tyson S. Dines for the defendants in error and concluded by Mr. Earl M. Cranston for the plaintiff in error.

Thereupon the cause was submitted to the Court upon the transcript of record from said District Court and the briefs of counsel filed herein.

(Stipulation to Vacate Submission and Continue Cause to May Term, 1907.)

And on the tenth day of December, A. D. 1906, a stipulation to vacate the submission and continue cause to the May Term, 1907, was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

United States of America,
v.
Chamberlain, et al., Exrs.

It is hereby stipulated and agreed by and between the parties hereto that the order of submission entered this day be vacated and set aside and that this cause may be continued to the May term, 1907, of this Court.

5 December 10, 1906.

EARL M. CRANSTON,
Attorney for Plaintiff in Error.

TYSON S. DINES,
Atty. for Defendants in Error.

(Endorsed): No. 2422. United States of America, Plff. in Error, vs. Carl S. Chamberlin, et al., Executors &c. Stipulation to vacate submission and continue to May term, 1907. Filed Dec. 10, 1906, John D. Jordan, Clerk.

(Order Vacating Submission and Continuing Cause to May Term, 1907.)

And on the tenth day of December, A. D. 1906, in the record of the proceedings of said Circuit Court of Appeals is an order vacating the submission and continuing cause to the May term, 1907, in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

December Term, 1906. Monday, December 10, 1906.

The United States of America, Plaintiff in Error,
No. 2422. vs.
Carl S. Chamberlin, et al., Executors &c.

In Error to the District Court of the United States for the District of Colorado.

This cause having been again called this day, it is now here ordered, pursuant to the stipulation of the parties, that the order of submission of this cause be vacated and set aside and that the cause be and the same is hereby continued until the May Term, 1907, of this Court.

(Appearance of Mr. Ralph Hartzell, as Counsel for Plaintiff in Error.)

And on the sixth day of May, A. D. 1907, the appearance of Mr. Ralph Hartzell, as counsel for plaintiff in error, was filed in said cause, in the words and figures following, to-wit:

6 United States Circuit Court of Appeals, Eighth Circuit.

The United States of America, Plaintiff in Error,
No. 2422. vs.
Carl S. Chamberlin, et al., Executors, &c.

The Clerk will enter my apppearance as Counsel for the Plaintiff in Error.

RALPH HARTZELL.

(Endorsed): U. S. Circuit Court of Appeals, Eighth Circuit. No. 2422. United States of America, Plaintiff in Error, vs. Carl S. Chamberlin, et al., Executors &c. Appearance. Filed May 6, 1907, John D. Jordan, Clerk. Ralph Hartzell, Counsel for Plff. in Error.

(Appearance of Mr. Orville L. Dines, as Counsel for Defendants in Error.)

And on the sixth day of May, A. D. 1907, the appearance of Mr. Orville L. Dines, as counsel for the defendants in error, was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

The United States of America, Plaintiff in Error.
No. 2422. vs.
Carl S. Chamberlin, et al., Executors &c.

The Clerk will enter my appearance as Counsel for the Defendants in Error.

ORVILLE L. DINES.

(Endorsed): U. S. Circuit Court of Appeals, Eighth Circuit. No. 2422. United States of America, Plaintiff in Error, vs. Carl S. Chamberlin, et al., Executors, &c. Appearance. Filed May 6, 1907, John D. Jordan, Clerk. Orville L. Dines, Counsel for Defts. in Error.

7

(Order of Argument.)

And on the sixth day of May, A. D. 1907, in the record of the proceedings of said Circuit Court of Appeals is an order of argument in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

May Term, 1907. Monday, May 6, 1907.

The United States of America, Plaintiff in Error,
No. 2422. vs.
Carl S. Chamberlin, et al., Executors, etc.

In Error to the District Court of the United States for the District of Colorado.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Ralph Hartzell for plaintiff in error, and the hour for adjournment arriving further argument is postponed until tomorrow.

(Order of Submission.)

And on the seventh day of May, A. D. 1907, in the record of the proceedings of said Circuit Court of Appeals is an order of submission in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

May Term, 1907. Tuesday, May 7, 1907.

The United States of America, Plaintiff in Error,
No. 2422. vs.
Carl S. Chamberlin, et al., Executors, etc.

In Error to the District Court of the United States for the District of Colorado.

This cause having been called for further hearing, argument was continued by Mr. Ralph Hartzell for plaintiff in error, by Mr. Orville L. Dines for defendants in error and concluded by Mr. Ralph Hartzell for the plaintiff in error.

8 Thereupon, this cause was submitted to the Court on the transcript of record from said District Court and the briefs of counsel filed herein.

(Opinion.)

And on the seventeenth day of October, A. D. 1907, the opinion of said United States Circuit Court of Appeals was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

9 September Term, A. D. 1907.

The United States of America, Plaintiff in Error,
No. 2422. vs.
Carl S. Chamberlin, D. H. Rice and Tyson S. Dines, as executors of the last will and testament of Winfield Scott Stratton, deceased, Defendants in Error.

In Error to the District Court of the United States for the District of Colorado.

Mr. Ralph Hartzell, Assistant United States Attorney (Mr. Earl M. Cranston, United States Attorney, and Mr. Ernest Knaebel, Special Assistant United States Attorney, were with him on the brief) for plaintiff in error.

Mr. O. L. Dines (Mr. E. E. Whitted was with him on the brief) for defendants in error.

Before Sanborn and Hook, Circuit Judges, and Philips, District Judge.

Philips, District Judge, delivered the opinion of the Court.

In 1905 the plaintiff in error, the United States of America, instituted this suit in the United States District Court for the District of Colorado, to recover of the defendants in error, as executors of the will of Winfield Scott Stratton, the sum of $4,883.00, the amount of revenue stamps alleged to be owing by said estate on a deed of conveyance made by said Stratton on the 23d day of May, 1899, conveying to Stratton's Independence Limited, a corporation, certain mining property located in the Cripple Creek Mining District of Colorado. The petition alleged that the consideration expressed in the deed was four million eight hundred and fifty thousand dollars, on which revenue stamps were placed amounting to $4,850.00; whereas the true and actual consideration for the conveyance was nine million seven hundred and thirty-three thousand dollars, leaving the amount of stamps due $4,883.00 The court below sustained a demurrer to this petition. To reverse this judgment the United States prosecutes this writ of error.

The question for decision is, can the Government maintain the action of indebitatus assumpsit for the recovery of such tax? The tax claimed arose under what is popularly known as the Spanish War tax, provided for by act of Congress of June 13, 1898 (Supplement to the Revised Statutes, Vol. 2, No. 8, 1897-1899.)

10 Under Schedule A it is provided that a deed conveying lands, tenements, or other realty, "the purchaser or

purchasers, or any other person or persons, by his, her or their direction, when the consideration or value exceeds one hundred dollars and does not exceed five hundred dollars" shall place upon it a stamp of fifty cents, and for each additional five hundred dollars or fractional part thereof in excess of five hundred dollars, fifty cents. Section 25 of the Act provides "that the Commissioner of Internal Revenue shall cause to be prepared for the payment of the taxes prescribed in this Act suitable stamps denoting the tax on the document, article or thing to which the same may be affixed."

The Act specifies what the penalty and consequences shall be for a failure to attach to the instrument the required stamps. Section 7 declares:

"That if any person or persons shall make, sign, or issue, or cause to be made, signed, or issued, any instrument, document, or paper of any kind or description whatsoever, without the same being duly stamped for denoting the tax hereby imposed thereon, or without having thereon an adhesive stamp to denote said tax, such person or persons shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not more than one hundred dollars, at the discretion of the court, and such instrument, document, or paper, as aforesaid, shall not be competent evidence in any court."

Section 10:

"That if any person or persons shall make, sign, or issue, or cause to be made, signed, or issued, or shall accept or pay, or cause to be accepted or paid, with design to evade the payment of any stamp tax, any bill of exchange, draft, or order, or promissory note for the payment of money, liable to any of the taxes imposed by this act, without the same being duly stamped, or having thereupon an adhesive stamp for denoting the tax hereby charged thereon, he, she, or they shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding two hundred dollars, at the discretion of the court."

Section 13:

"That any person or persons who shall register, issue, sell, or transfer, or who shall cause to be issued, registered, sold, or transferred, any instrument, document, or paper of any kind or description whatsoever mentioned in schedule A of this Act, without the same being duly stamped, or having thereupon an adhesive stamp for denoting the tax chargeable thereon, and canceled in the manner required by law, with intent to evade the provisions of this Act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall

be punished by a fine not exceeding fifty dollars, or by imprisonment not exceeding six months, or both, in the discretion of the court; and such instrument, document, or paper, not being stamped according to law, shall be deemed invalid and of no effect." (The proviso of this section authorizes the subsequent validation of the instrument by placing the stamps thereon).

11 "But no right acquired in good faith before the stamping of such instrument, or copy thereof, as herein provided, if such record be required by law, shall in any manner be affected by such stamping as aforesaid."

Section 14:

"That hereafter no instrument, paper, or document required by law to be stamped, which has been signed or issued without being duly stamped, or with a deficient stamp, nor any copy thereof, shall be recorded or admitted, or used as evidence in any court until a legal stamp or stamps, denoting the amount of tax, shall have been affixed thereto, as provided by law.* * *."

Section 15:

"That it shall not be lawful to record or register any instrument, paper, or document required by law to be stamped unless a stamp or stamps of the proper amount shall have been affixed and canceled in the manner prescribed by law; and the record, registry, or transfer of any such instruments upon which the proper stamp or stamps aforesaid shall not have been affixed and canceled as aforesaid shall not be used in evidence."

These are the only provisions of the statute respecting the manner of obtaining the revenue from such conveyances, and they contain the only remedial provisions for the enforcement of payment. The language of Section 25 clearly enough indicates that "the payment of the taxes prescribed in this Act" shall be by "suitable stamps denoting the tax on the document," etc. These were to be prepared by the Commissioner of Internal Revenue, and when bought from the local collector they were to be affixed to the instrument by the vendor or the vendee. No antecedent assessment was provided for or contemplated in respect of this character of tax.

Reliance for the enforcement of the payment of the tax claimed in this case as a debt owing to the Government is placed principally upon the decision in Savings Bank v. United States, 19 Wall. 227. The tax in that case was based upon the Internal Revenue Act of July 13, 1866 (14 Statutes at Large, 98), which levied a tax of five per cent on bank dividends.

The tax was to be paid in money by the bank on the stock of the shareholder. The list or return was required to be made and rendered to the assessor by the bank on or before a given date, in which any dividends or sums of money became due or payable, and the president, cashier, or treasurer of the bank was required to annex thereto a declaration, under oath, in form and manner as prescribed by the Commissioner of Internal Revenue, that the same contained a true and faithful account of the taxes aforesaid." And for any default in making or rendering such list or return, with such declaration annexed, the defaulting bank should forfeit as a penalty the sum of $1,000, and for failure to make or render the list or return, or for any default in the payment of the tax as required, the assessment and collection of the tax and penalty shall be in accordance with the general provisions of law in other cases of neglect and refusal.

12 From which it is apparent that the amount of the tax to be paid was assessed on a particular fund—a dividend in favor of an ascertained beneficiary; and payment of the amount so assessed was to be made in money by the bank to the collector of internal revenue. While the act provides for the imposition of a penalty in the nature of a forfeiture, on default of the bank in performing the duties imposed upon it, the act went further and expressly declared:

"That it shall be the duty of the collectors aforesaid, or their deputies, in their respective districts, and they are hereby authorized, to collect all the taxes imposed by law, however the same may be designated, and to prosecute for the recovery of any sum or sums which may be forfeited by law; and all fines, penalties, and forfeitures which may be incurred or imposed by law, shall be sued for and recovered, in the name of the United States, in any proper form of action, or by any appropriate form of proceeding, qui tam or otherwise, before any circuit or district court of the United States for the district within which said fine, penalty, or forfeiture may have been incurred, or before any other court of competent jurisdiction. And taxes may be sued for and recovered, in the name of the United States, in any proper form of action before any circuit or district court of the United States within which the liability to such tax may have been or shall be incurred, or where the party from whom such tax is due may reside at the time of the commencement of said action. But no such suit shall be commenced unless the Commissioner of Internal Revenue shall authorize or sanction the proceedings."

With the greatest respect for the eminent jurist who wrote the opinion in the Savings Bank case, we submit that what is

said in the course of the opinion respecting the exemption of the general Government from established recognized common law rights of action and limitations upon the character of action permissible to it, respecting its right to treat a tax as a debt recoverable in the form of assumpsit indebitatus, was quite obiter dictum, as the statute imposing the tax in question expressly declared that it could be recovered by suit at law, and as disclosed in the facts of the case the Commissioner of Internal Revenue had sanctioned the proceeding. The statute itself was an all-sufficient authority for the maintenance of the suit. The tax itself became a charge upon a particular fund, payable in money, directly to the collector of Internal Revenue, and possessed none of the qualities of a duty to be paid in stamps.

In view of the express provision of the statute providing for the recovery of such a tax by suit it ought not to be said that it was the mind of the court in the Savings Bank case to overturn the hitherto generally recognized rule of law that a tax is not regarded as a debt. In Lane County v. Oregon, 7 Wall. 71, 79, 80, 87, the Chief Justice, delivering the unanimous opinion of the court, speaking of the clause of the Constitution giving to Congress the power to lay and collect taxes, said:

"What then is its true sense? The most obvious, and, as
13 it seems to us, the most rational answer to this question is, that Congress must have had in contemplation debts originating in contract or demands carried into judgment, and only debts of this character. This is the commonest and most natural use of the word. Some strain is felt upon the understanding when an attempt is made to extend it so as to include taxes imposed by legislative authority, and there should be no such strain in the interpretation of a law like this. We are more ready to adopt this view, because the greatest of English elementary writers upon law, when treating of debts in their various descriptions, gives no hint that taxes come within either; while American State courts, of the highest authority, have refused to treat liabilities for taxes as debts, in the ordinary sense of that word, for which actions of debt may be maintained."

Then quoting from City of Camden v. Allen, 2 Dutcher, 398:

"A tax, in its essential characteristics, is not a debt nor in the nature of a debt. A tax is an impost levied by authority of government upon its citizens, or subjects, for the support of the State. It is not founded on contract or agreement. It operates in invitum. A debt is a sum of money due by certain and express agreement. It originates in and is founded upon contracts express or implied."

In Meriwether v. Garrett, 102 U. S. 472, the opinion was written by Mr. Justice Field, who dissented in the Savings Bank case supra. He asserted broadly that: "Taxes are not debts. It was so held by this court in the case of Oregon v. Lane County, reported in 7th Wallace." It is true that that was not a suit either by the United States or by the State of Tennessee, but it was the assertion of the sovereignty of the state through the legislative authority; and the whole reasoning of the court was that both the levying and collecting of the tax are legislative matters and are not judicial, and therefore he said:

"Having the sole power to authorize the tax, it must equally possess the sole power to prescribe the means by which the tax shall be collected, and to designate the officers through whom its will shall be enforced. * * * In the distribution of the powers of government in this country into three departments, the power of taxation falls to the legislative."

It is a significant fact that in the dissenting opinion Mr. Justice Strong, who wrote the opinion in the Savings Bank case, reasserted that "by the lawful assessment and levy of a tax the taxpayer becomes a debtor to the municipality, and the debt may be recovered, like other debts, by a suit at law; or, when it is a lien, by a bill of equity."

In Thompson v. Allen County, 13 Fed. 99, Mr. Justice Matthews, referring to the Meriwether case, said:

"I am constrained to conclude that it was decided by the spirit and logic of that case that the collection of a public tax as much belongs to the authority of the state as its levy
14 and assessment, and the reasons which forbid a court to supply the latter, apply with equal force to the former."

In Crabtree v. Madden, 54 Fed. 426, 4 C. C. A. 408, the tax sought to be collected was imposed by the Indian Tribes. This court, speaking through Judge Sanborn, after asserting that the authority imposing the tax had equal power to prescribe the remedies and designate the officers to collect it, asserted the proposition that actions at law for the collection of taxes, as a rule, are unauthorized, and that the general rule is that where remedies are provided and such an action is not named as one of them a common law action to recover the tax would not lie even in the courts of the sovereignty which had imposed them. He further said:

"The counsel for plaintiffs attempts to escape this conclusion by the argument that this tax is a debt; that it arises

upon an implied contract; that the court has jurisdiction to enforce such contracts, and hence of this action. This position is not tenable. Taxes are not debts. They do not rest upon contract, express or implied. They are imposed by the legislative authority without the consent and against the will of the persons taxed, to maintain the government, protect the rights and privileges of its subjects, or to accomplish some authorized, special purpose. They do not draw interest, are not subject to set-off, and do not depend for their existence or enforcement upon the individual assent of the taxpayers."

It may be conceded that a tax imposed in favor of the government, whether by assessments or other means, having been ascertained so as to become fixed either as a lien on specific property or as a claim in personam, no matter what technical name may be given to the suit, the government would be afforded a remedy through its courts for the enforcement of its payment, unless it appears from the statute that in respect of the particular tax it was not contemplated that it should be collected by a suit at law.

As a means for the enforcement of the purchase of the tax stamps, which was the only mode of payment prescribed by the act, the statute subjected the derelict to prosecution as a misdemeanant and to a fine of one hundred dollars, and in addition thereto it disentitled the deed to admission of record under the recording statutes of the state and rendered it inadmissible in evidence in the courts. On the face of the act these penalizing provisions were deemed by Congress as far as it cared to go toward the enforcement of the payment of this tax.

It is not persuasive to say that the penalty and disqualifying incidents imposed might not be effective to compel the purchase of a large amount of stamps. While the penal sum imposed as a fine or the imprisonment might not be a sufficient deterrent against evasions of the tax, the scandal of a conviction under indictment or criminal information, and the other consequences attached for the non-affixing of the stamps were most serious. The non-admission of the deed of conveyance as a muniment of title might be most disastrous to the grantee in the event of the interposition of the creditors of the grantor or subsequent grantees or mortgagees. In the event of a judicial inquiry where the rights of the grantee were at issue the inadmissibility of his deed in evidence, for the lack of stamps, might be ruinous to him.

It is sufficient, however, to say that Congress in framing the Statute deemed the liabilities and disabilities imposed adequate enough to enforce compliance. The judicial

branch of the government has no right to challenge the legislative discretion. The established rule of the common law is that where a legislative act creates a new right or imposes a new burden, and specifies certain remedies in the form of penalties, and the like, the prescription is exclusive of any other remedy.

It is a note-worthy fact that in the matter of "Legacies and Distributive Shares of Personal Property" (p. 798-799 of the Act of 1898), where the tax is ascertained from schedules and constitutes a lien upon the decedent's estate, on refusal of the administrator or executor to pay, it is provided that "the collector shall commence appropriate proceedings before any court of the United States, in the name of the United States, against such person or persons as may have the actual or constructive custody or possession of such property or personal estate, or any part thereof, and shall subject such property or personal estate, or any portion of the same, to be sold upon the judgment or decree of such court" etc. No like provision was made in respect of the failure to place upon any written instrument the required stamps.

The contention on behalf of the Government is that this suit is maintainable by reason of Section 31 of the Act, which declares that:

"All administrative, special or stamp provisions of law, including the laws in relation to the assessment of taxes, not heretofore specifically repealed, are hereby made applicable to this Act."

In order to make said section effective to the end desired, it is futher claimed that it had reference to and incorporated into the statute the provisions of Section 9 of the Internal Revenue Act of 1866, authorizing suit by the Government to recover taxes (which has hereinbefore been quoted), which now constitutes Section 3213 R. S. U. S. 1878. This, it must be conceded, would be a remarkable extension of the ordinary import of the terms and words employed in said Section 31. It occurs under the heading "Legacies and Distributive Shares of Personal Property," declaring that estates in descent and distribution shall be taxed, and providing the amount and the manner of ascertaining the same. As the stamp tax in respect of deeds of conveyance imposed by the war revenue acts of 1864 and 1866 were repealed by the Act of June 6, 1872 (17 Statutes at Large, 256), the term "stamp provisions" could have no reference to provisions pertaining to stamps on deeds of conveyance, for those had been "heretofore specially repealed." But there were "laws in respect to the assessment of

taxes" which had not hitherto been repealed, such as inheritance taxes, legacies and personal property, and assessments on incomes.

16 The term "special"—that is, special provisions of law—certainly did not point out said Section 3213 of the General Statutes, supra, as that is a general law applicable to all taxes collectible by suit. Its natural import is that it refers to some special provisions of some act which might not have been specified in the particular act. But it can have no reference to provisions respecting the payment of taxes by stamps, as the Act of 1898 presents a plenary system, with definite details as to the manner of their payment, and prescribes the remedy for its enforcement.

The only remaining term, therefore, in Section 31 upon which the Government's contention can be hung is the word "administrative." The ordinary, common acceptation of this term is that it pertains to matters that are ministerial, administrative or executive. An assessment might with admissible property, imple a mere ministerial act; but the specification in the section of "laws in relation to the assessment of taxes" clearly enough indicates that in the judgment of Congress the word "administrative" was not sufficient to comprehend an assessment. The omission of the word "collection", which is so closely allied to and usually follows an assessment, would indicate that it was purposely omitted. In any event, the term "collection" is not expressed and the court has no authority to read it into the statute.

There is another persuasive, if not conclusive, fact that it was not the mind of Congress that a suit could be maintained for the recovery of taxes growing out of a failure to put the required revenue stamps on a deed or other written instrument. Section 7 of the Act of April 12, 1902 (32 Statutes at Large, 97), expressly repeals the Act of 1898 requiring deeds of conveyance to be stamped and fixing the amount thereof, and it also expressly repealed Section 29 of the Act of 1898 respecting legacies and distributive shares of personal property. But this was qualified by the provision (Section 8) "that all taxes or duties imposed by Section 29 of the Act of June 13, 1898, and amendments thereof, prior to the taking effect of this Act, shall be subject, as to lien, charge, collection, and otherwise, to the provisions of Section 30 of the Act of June 13, 1898, and amendments thereof, which are hereby continued in force." It then recopied said Section 30 providing for the manner of assessments and the legal procedure to recover that tax by suit. The failure of Congress to make a like reservation in

respect of the enforcement of the collection of taxes under the stamp act furnishes, to our minds, an irrefragable argument against the contention of the Government.

Suggestive argument is futhermore furnished by reference to other statutes in pari materia respecting tax stamps to be placed on certain packages and articles. Take the Act of June 6, 1896, imposing a tax upon the sale, etc., of "Filled Cheese" (29 Statutes 253). Section 10 provides that whenever any manufacturer sells or removes for sale any filled cheese upon which the tax is required to be paid by stamps, without paying such tax, it shall be the duty of the Commissioner of Internal Revenue, within a period of not more than
17 two years after such sale or removal, upon satisfactory proof, to estimate the amount of tax which has been omitted to be paid and to make an assessment therefor and certify the same to the collector. "The tax so assessed shall be in addition to the penalties imposed by law for such sale or removal." Section 17 provides: "That all fines, penalties, and forfeitures imposed by this Act may be recovered in any court of competent jurisdiction." While the act for the enforcement of the payment of this stamp duty provides penalties and forfeitures, in order that that should not be regarded as the only remedy for the enforcement of the tax, the statute expressly declares that the tax shall be in addition to the penalties imposed by law for such failure, and consequently could be recovered by suit under said Section 3213, supra.

The Act of June 13, 1898 (30 Statutes at Large, 448, 468), providing for the payment of taxes on Mixed Flour, declares that "the tax levied by this section shall be represented by coupon stamps;" and that the Commissioner of Internal Revenue for a period of not more than one year after such sale, consignment or removal, is to estimate the amount of the tax which should have been paid, make an assessment therefor and certify the same to the collector of the proper district. "The tax so assessed shall be in addition to the penalties imposed by this Act for an unauthorized sale or removal;" with a further provision "that all fines, penalties, and forfeitures imposed by the section specified may be recovered in any court of competent jurisdiction."

So the Act of August 27, 1894 (28 Statutes, 562), declares that whenever any article upon which a tax is required to be paid by means of a stamp is sold or removed for sale by the manufacturer thereof, without the use of the proper stamp, in addition to the penalties imposed by law for such sale or removal, it shall be the duty of the Commissioner of Internal

Revenue, within a period of not more than two years after such sale or removal, to estimate the amount of the tax which has been omitted to be paid, and to make an assessment therefor upon the manufacturer or producer of such article, the amount to be certified to the collector, who shall demand payment of such tax; "and upon the neglect or refusal of payment by such manufacturer or producer, shall proceed to collect the same in the manner provided for the collection of other assessed taxes."

The Act of August 2, 1886 (24 Statutes, 209), imposed a tax on the manufacture and sale of Oleomargarine. Section 6 of the Act provided that:

"Every person who knowingly sells or offers for sale, or delivers or offers to deliver, any oleomargarine in any other form than in new wooden or paper packages, as above described, or who packs in any package any oleomargarine in any manner contrary to law, or who falsely brands any package or affixes a stamp on any package denoting a less amount of tax than that required by law, shall be fined for each offense not more than one thousand dollars, and be imprisoned not more than two years."

18 Section 8, after declaring the amount of tax per pound to be paid by the manufacturer thereof, declares that:

"The tax levied by this section shall be represented by coupon stamps; and the provisions of existing laws governing the engraving, issue, sale, etc., relating to tobacco and snuff, as far as applicable, are hereby made to apply to stamps provided for by this section."

And Section 9 declares that whenever there shall be a sale "without the use of the proper stamps, it shall be the duty of the Commissioner of Internal Revenue, within a period of not more than two years after such sale, etc., to estimate the amount of the tax which has been omitted to be paid, and to make an assessment therefor and certify the same to the collector, and "the tax so assessed shall be in addition to the penalties imposed by law for such sale or removal."

The absence of such a provision in the Act of 1898, to the effect that the penalties and forfeitures shall be in addition to the amount of the tax to be paid, in respect of the stamps required to be placed on written instruments, and the like, is significant. In respect of the articles above enumerated the assessment of the tax was made upon the thing itself, and created an obligation in personam for the tax after the assessment made by the collector, as provided by the statutes.

There are numerous reported cases under the war revenue tax acts wherein suits were instituted to enforce the collection of taxes under other provisions imposing an assessment upon the think itself or the fund arising in a particular way. As every lawyer who was in active practice during the period when the stamp acts of 1864 and 1866 were in force will recall, the holders of instruments required by the acts to be stamped met with serious defeats in litigation where the unstamped instruments were rejected in evidence. While some state courts held that the Act could not thus determine for the state courts the question of the competency of such instruments as evidence, a great majority of the state courts affirmed the validity of the Act in this respect, and the Federal Courts uniformly enforced it. Notwithstanding the fact that failures in certain instances to place on the designated written instruments the required stamps was brought to public attention, there is not a reported case showing that the Government conceived that it had a right of action to recover such tax as a debt. And there is but one reported case under the war revenue tax in question where such right of action has been asserted, and that is the case of McClain v. Fleshman, 105 Fed. 610. That was a suit instituted against the Collector of Internal Revenue to recover back a tax alleged to have been illegally exacted, growing out of the failure of a stock-broker to affix revenue stamps to certain memoranda of sales. The circuit court overruled a demurrer to the petition, on the distinct ground that as the stamp duty imposed by the statute was collectible through the sale of stamps and in no other prescribed mode, and the statute having prescribed what penalties might be enforced and recovered, attaching other penalizing incidents for
19 failure to affix the stamp, the right to maintain the suit, therefore, could not arise by implication. This ruling was affirmed by the Court of Appeals of the Third Circuit in 106 Fed. 880, 46 C. C. A. 15. While Gray, Circuit Judge, who spoke for the court, held that the tax was not demandable on other grounds as well, he took pains to say that the grounds upon which the court below based its opinion were "equally controlling and decisive of the case in hand," and then proceeded to adopt the opinion of the District Judge. He said, inter alia:

"Congress possessed the sole power to authorize this tax, and the sole power to prescribe the means by which it should be collected. No remedy by suit is given or implied by the act in question, nor is there to be discovered any authority to demand and accept money in lieu of the stamps that are required by law to be affixed. * * * A penalty for failure to obey this

statutory requirement is provided, but I find no other remedy in the act."

It seems to us that a contrary view of the statute in question would be far-reaching in its consequences. There is no limitation imposed by the statute of 1898 limiting such suits for the sufficient reason that the Congress, in our opinion, never for one moment conceived that the United States afterwards, when all the moneys had been realized under the statute for the exigencies of the war debt, and after it had repealed the statute, zealous inspectors or prowlers through ancient records might discover that some instrument had not been properly stamped, and the courts be flooded with suits for the recovery of the deficiencies.

The tax sued for accrued in 1899. Mr. Stratton died in 1901. Under the laws of Colorado claims against estates of decedents are required to be presented for allowance within two years. This suit was not brought until after the lapse of about six years, and after the repeal of the statute and the calling in for cancellation by the Internal Revenue Department of all such stamps. The language of Mr. Justice Bradley, in Savings Bank v. United States, supra, would have a juster application to the situation of this suit: "If the matter is left open so that any person or corporation may be prosecuted for taxes at any time, it leaves the citizen exposed to many hazards, and to the mercy of prying informers, when the evidence by which he could have showa his immunity or exemption has perished."

Finding no express authority in the statute for such a proceeding, we are of opinion that the judgment of the district court should be affirmed. It is so ordered.

Filed October 17, 1907.

Hook, Circuit Judge, dissenting.

The question in this case is whether the Government is entitled to maintain an action for the recovery of stamp taxes imposed by the War Revenue Act of 1898. The Government contends that it is because (a) the rule of Savings Bank v. United States, 19 Wall. 227, still prevails, and (b) by express provision in the act itself Congress adopted and applied to the taxes therein levied all means of collection then authorized by law and among them was the remedy of plenary action.

I am not persuaded that Savings Bank v. United States has been overruled or that the court's full discussion and decision

that a right of action existed independent of statutory provision are obiter dicta. The Supreme Court based its conclusion upon two distinct and independent grounds, either of which was sufficient: First, general principles of law and particularly those respecting the attributes of sovereignty, and second, a provision of the statute then in question applying to the particular case. It is manifest that what was said upon either of these cannot be held to be obiter. Any doubt about this would be dispelled by Union Pacific Co. v. Mason City Co., 199 U. S. 171, wherein Mr. Justice Brewer said:

"Of course, where there are two grounds, upon either of which the judgment of the trial court can be rested, and the appellate court sustains both, the ruling on neither is obiter, but each is the judgment of the court and of equal validity with the other."

This language was used in affirmance of our own decision in that case (64 C. C. A. 348, 128 Fed. 230) wherein Judge Sanborn said:

"Where a court places its decision of the ultimate legal issue before it upon its decisions of two legal questions which were pertinent to the issue, debated at the bar, considered and determined in the opinion, the decision of either one of which is sufficient to sustain the determination of the ultimate issue, the decision of each of the two questions and of every pertinent legal question decided in reaching either decision has the binding force of an adjudication, and is not a mere obiter dictum."

It is equally clear that Savings Bank v. United States has not been overruled by Meriwether v. Garrett, 102 U. S. 472, or its authority impaired by that case or by the earlier case of Lane County v. Oregon, 7 Wall. 71. In the Lane County case it was decided that the statutes of Oregon required certain taxes to be paid in gold and silver coin and that the term debts used in the legal tender acts of Congress had no reference to taxes imposed by state authority. Nothing more was decided. In the Meriwether case, which is relied on as a departure from the rule of Savings Bank v. United States, the question now before us, namely, whether the government can maintain an action for the recovery of taxes levied by it, did not arise at all, and was not decided. Justice Field did not deliver the opinion of the court. In fact there was no opinion by the court. There was merely a brief statement of legal conclusions upon the facts involved without an expression of the reasons which induced them. Justice Field on behalf of himself and Justices Miller and Bradley merely wrote a statement of the reasons which

controlled their concurrence. Three other justices, Strong, Swayne and Harlan, dissented. But as already observed the question before us was not there involved. It is a curi-
21 ous fact that Justice Miller for whom Justice Field spoke in the Meriwether case delivered the opinion in United States v. Pacific Railroad, which I will presently advert to again, in which he held that the Government could maintain an action to recover a tax, and in referring to Savings Bank v. United States said:

"In that case the Supreme Court held that for the purposes of that collection and in some senses it was a debt; that the tax—which I presume was the same kind of a tax as this is—could be so collected."

In Savings Bank v. United States the court referred to the established practice in England of actions and suits in the nature of debt being maintained by the crown for the recovery of taxes and duties, though such remedies were unauthorized by statute. The court also referred with approval to decisions in this country holding that the Government was entitled to such remedy. United States v. Lyman, 1 Mason 482, Fed. Cas. No. 15,647; Meredith v. United States, 13 Pet. 486. In the Lyman case will be found an exhaustive discussion of the question by Justice Story and full reference to the English authorities.

The rule of Savings Bank v. United States finds abundant support, were any needed, in other decisions of the National courts. In Stockwell v. United States, 13 Wall. 531, it was said:

"Debt lies whenever a sum certain is due to the plaintiff or a sum which can readily be reduced to a certainty—a sum requiring no future valuation to settle its amount. It is not necessarily founded upon contract. It is immaterial in what manner the obligation was incurred or by what it is evidenced if the sum owing is capable of being definitely ascertained."

See also Chaffee v. United States, 18 Wall. 516.

United States v. Pacific Railroad, 4 Dill. 66, Fed. Cas. No. 15,983, was a suit in equity to recover the amount of taxes claimed to be due from the railroad company under the Internal Revenue law and to enforce the lien of the taxes upon its property. Mr. Justice Miller, with whom Judge Dillon was associated, said:

"A good deal of argument on both sides has been presented to us upon the question whether an action to recover taxes is

an action of debt, and whether an obligation to pay taxes to the Government is a debt * * *. In the view that all of us here take I think, however, that this discussion is immaterial. It is immaterial what you call the obligation of a citizen to pay his taxes; it is very clearly an obligation which may be enforced by the courts."

The doctrine of Savings Bank v. United States was recognized as controlling by Justice Clifford and the District Judge who sat with him in United States v. Hazard, Fed. Cas. No. 15,337. In United States v. Cobb, 11 Fed. 76, it was said, that the settled rule that import duties were personal debts of the importer for which action would lie had been applied to the Internal Revenue Acts. In United States v. Dodge, 1
22 Deady 124, Fed. Cas. No. 14,973, the Meredith case, supra, is cited as authority for a personal liability of importer and consignee for import duties, and in the Meredith case the liability was sustained upon general principles of law. United States v. Tilden, 9 Ben. 368, Fed. Cas. No. 16,519, was an action to recover income taxes but it involved the questions now before us—whether the remedies specified in the act imposing the tax were exclusive, and whether an action in debt would lie. Judge Blatchford, after an exhaustive discussion of the Savings Bank case, said that it decided every question before him; he also disposed of the contention that certain portions of the opinion in that case were obiter. United States v. Washington Mills, 2 Cliff. 601, Fed. Cas. No. 16,647, was an action to recover a revenue tax under the act of June 30, 1864. Justice Clifford said:

"Objection is also made to the right of the plaintiffs to recover in this case, because it is insisted that the remedy by distraint as given in the Act of Congress is the exclusive remedy in the case. * * * Extended argument upon this subject, however, is unnecessary as the question is regarded as settled by the decisions of the Supreme Court. The same objection was made in the case of Meredith v. United States, 13 Pet. (38 U. S.), 493, which was a suit for duties on imports. Duties due upon all goods imported, say the court in that case, constitute a personal debt due to the United States from the importer, independently of any lien on the goods or any bond given for the duties. * * *

"Assumpsit for taxes imposed under the acts of Congress providing for Internal Revenue is also the proper form of action."

In King v. United States, 99 U. S. 229, a case not involving the question before us, Justice Miller in speaking for the court,

said: "The court held explicitly (in the Savings Bank case) that the obligation to pay the tax did not depend on an assessment made by any officer whatever, but that the facts being established on which the tax rested, the law made the assessment, and an action of debt could be maintained to recover it, though no officer had made an assessment."

In United States v. Erie Railway Co., 107 U. S. 2, the court adverted to what had been decided in the Savings Bank case, and not with disapproval; also in United States v. Reading Railroad, 123 U. S. 113 and in United States v. Snyder, 149 U. S. 210.

There is no decision of the Supreme Court which, when rightly regarded, impairs the controlling authority of Savings Bank v. United States. The state courts are in conflict, the majority favoring the contrary doctrine. Judge Dillon in his work on Municipal Corporations (Vol. 2, Sec. 815), says:

"When the power to levy the tax is plainly given, the right to collect by suit should not be taken to be impliedly denied unless the intention of the legislature that the special mode prescribed should be the only mode, appears with reasonable certainty."

23 Defendants rely upon Crother v. Madden, 4 C. C. A. 408, 54 Fed. 426, and McClain v. Fleshman,....C. C. A....., 106 Fed. 880, 105 Fed. 610. In the first of these it is said that taxes are not debts, but it should be observed that the case was an attempt to collect in the courts of one sovereignty taxes levied under the laws of another. The other case was an action to recover from a collector of Internal Revenue moneys alleged to have been illegally demanded and received by him under claim that they were due by virtue of section 6 of the War Revenue Act. To secure payment the collector threatened the plaintiff with "proceedings" The District Court and the Court of Appeals of the Third Circuit held that the penalties specifically prescribed in the act were the sole means of enforcing payment and that there was nothing in the act giving or implying authority "to demand and accept money in lieu of the stamps that are required by law to be affixed". The case of Savings Bank v. United States was not called to the court's attention nor was reference made to section 31 of the Act.

In both the Lyman and Meredith cases, supra, holding that duties were recoverable by the Government in an action of debt, significance was attached to the employment in the act imposing the duties of the phrase "there shall be levied, col-

lected and paid." The same phrase is found in that part of the War Revenue Act now under discussion which relates to the documents, instruments etc., of Schedule A. In other words, Congress enacted that there shall be "levied, collected and paid for and in respect of" those documents and instruments "the several taxes or sums of money set down in figures against the same respectively." I apprehend that it is a matter of no importance at all to the question before us that for convenience in the administration of the law provision was made that the person liable to pay the money was authorized to do so by purchasing, affixing and cancelling stamps. That is an administrative detail quite useful in giving evidence of compliance with the law but having no bearing upon the inherent nature of the tax or upon the remedies of the Government for default in payment. Nor does it signify anything to say that a tax or other due, duty or obligation is a debt or that it is not a debt unless we are given to know the text in which the term debt appears. Debt has a range of meaning from the narrowest to the widest, both in the law and out of it. The text determines. Thus, a tax may be a debt within statutes concerning bankruptcy, insolvency and the administration of estates of deceased persons and yet not so in those relating to set-off and legal tender. That in a broad sense a tax is a debt has been recognized ever since the days of Blackstone who said: "Whatever, therefore, the laws order anyone to pay, that becomes instantly a debt which he hath before-hand contracted to discharge" (3 Bl. Com. 158).

Again, I think it is quite clear that actions at law as means of collecting the taxes levied were expressly adopted by the War Revenue Act. That act imposed increased taxes upon fermented liquors, taxes termed by Congress special taxes on the occupations of bankers, brokers and the like, additional taxes on tobaccos and dealers and manufacturers thereof,
24 taxes in respect of the documents, etc., mentioned in Schedule A and the medicines, etc., in Schedule B. It also imposed what were termed excise taxes on those engaged in refining petroleum and sugar, also taxes on the transmission of legacies and distributive shares of personal property and upon various other subjects of taxation. Section 31 of the act is as follows: "That all administrative, special or stamp provisions of law, including the laws in relation to the assessment of taxes not heretofore specifically repealed are hereby made applicable to this act." I think that my associates are in error in saying that this section is under the heading "Legacies and distributive shares of personal property," the inference suggested being that the section

should be confined in its operation to the subject matter of that heading. The error in this seems manifest from the reading of the section itself. By the very terms of Section 31 pre-existing provisions of law were made applicable to the entire War Revenue Act and not merely to the preceding sections 29 and 30 which deal with legacies and distributive shares of personal property. If this method of construction is applied to other portions of the act it must with equal reason be said that section 28 comes under the heading "Excise taxes on persons, firms, companies and corporations engaged in refining petroleum and sugar," and is so confined in its operation, yet section 28 merely imposes a tax on every seat sold in a palace or parlor car and every berth sold in a sleeping car. At the time of the passage of this act there had existed for many years a comprehensive scheme for the collection of taxes constituting a machinery thoroughly familiar to the officers charged with its operation and to a great extent illumined by the decisions of the courts and the rulings of administrative officials. Among those provisions is Section 3213 of the Revised Statutes under the title "Internal Revenue" which provides, among other things, that taxes may be sued for and recovered in the name of the United States in any proper form of action before any circuit or district court of the United States for the district within which the liability to such tax is incurred or where the tax debtor resides. This provision has been upon the statute books ever since 1866. The revenue act of 1864 (13 Stat. 236), levied stamp taxes similar to those of the act now before us. Section 41 authorized actions for the recovery of fines, penalties and forfeitures prescribed by that act. The act of 1866 (14 Stat. 110), left the stamp taxes in force but amended Section 41 so that the right of action extended to fines, penalties and forfeitures prescribed by any law and also to the taxes themselves. So as the law stood in 1866 there were stamp taxes like that in the case before us and the Government might sue for their recovery. Some years afterwards the sections imposing the stamp taxes were repealed but the remedy applicable to all taxes has remained to this day. Then in 1898 the War Revenue Act restored the stamp taxes. Can there be much doubt that without express provision the old general remedy for the recovery of all taxes applied to those imposed by the new act? Can there be any doubt whatever that to make the matter certain Congress inserted Section 31?

25 When the bill resulting in the War Revenue Act was called up for consideration in the House of Representatives April 27, 1898, Mr. Dingley who had charge of it said,

in explaining its scope and purport, that they had restored the adhesive stamp tax which existed from 1864 to 1872, placing it in large part on the basis of the old law as it stood in 1866 with certain additions (31 Cong. Rec. part 5 p. 4298). It seems to me altogether clear that by section 31 it was the intention of Congress to expressly adopt this old provision as part of the machinery for the enforcement of the taxes then levied. It made applicable to the act all "administrative provisions of law" and if section 3213 Rev. Stats. is not an administrative provision, what is it? When we speak of laws relating to the administration of estates we include laws prescribing the methods and remedies for the collection of the assets and their distribution and the powers of officers in connection therewith. When we speak of administrative provisions of law in respect of taxes I think we naturally include all those granting powers to executive officials and providing ways and means for collection. That this result was in the mind of Congress I little doubt. Mr. Dingley also said in explaining the general scope of the bill: "These taxes have been selected, first, because we have the machinery for the collection of them now and they can be collected with but slight additions to the force and with but slight increase of expense. We have selected them also because they were a source of revenue successfully seized upon during the Civil War" etc. (31 Cong. Rec. p. 4297). These same ideas were repeated during the progress of the bill until it finally was enacted into law.

I am unable to see why the repeal in 1902 of the provisions imposing taxes on the transmission of legacies and inheritances and the retention of the machinery for the collection of those already accrued is of significance in this case. The liability for accrued taxes in respect of conveyances still remained and so did section 31 of the act and also section 3213 of the Revised Statutes. Those sections were not repealed. Nor can I perceive any relevancy in other acts of Congress which provided that the taxes imposed should be in addition to fines, penalties and forfeitures prescribed for violation of particular commands of those acts, unless it is claimed that the absence of such provision in respect of the stamp taxes of the War Revenue Act is an argument that Congress intended that the payment of a fine under that act should operate as a payment of the tax and a release from further liability. I think that a statement of this argument is its refutation. No imprisonment was prescribed in the War Revenue Act for failure to stamp except when accompanied by an intent to evade the provisions of the act. No such intent is charged in this case. That some states deny the power of Congress to disqualify an unstamped instrument as evidence was known when the

act was passed and the inefficacy of such a disqualification as a coercive means was apparent. So much for the "fines, penalties and forfeitures" which it is claimed constitute the sole means of insuring payment of these taxes. It would be strange
26 that Congress should so intend when it was endeavoring to provide the Government with means vitally necessary for the conduct of a war—that it should not give the Government the simple remedies which every individual has for the collection of a debt. If Congress has power to enact that a tax shall be levied, collected and paid, and it does so enact, there is nothing so unusual or oppressive in an action for the recovery of the tax that such remedy should be denied, and it should not be denied unless it is evident that it was the legislative intent to limit the means of enforcement to the penal provisions of the act.

Filed October 17, 1907.

27 (Judgment.)

And on the seventeenth day of October, A. D. 1907, in the record of the proceedings of said Circuit Court of Appeals is a judgment in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

September Term, 1907. Thursday, October 17, 1907.

The United States of America, Plaintiff in Error,
No. 2422. vs.
Carl S. Chamberlin, D. H. Rice and Tyson S. Dines, as Executors of the last will and testament of Winfield Scott Stratton, deceased.

In Error to the District Court of the United States for the District of Colorado.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Colorado, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed without costs to either party in this Court.

October 17, 1907.

28 (Clerk's Certificate.)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the

foregoing transcript contains full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of said United States Circuit Court of Appeals (except the transcript of the record from the District Court of the United States for the District of Colorado), in a certain cause in said Court wherein The United States of America is Plaintiff in Error and Carl S. Chamberlin, D. H. Rice and Tyson S. Dines, as Executors of the last will and testament of Winfield Scott Stratton, deceased, are Defendants in Error, No. 2422, as full, true and complete as the same remain on file and of record in my office.

I do further certify that on the seventeenth day of December, A. D. 1907, a mandate was issued out of said Circuit Court of Appeals in said cause, directed to the Judges of the District Court of the United States for the District of Colorado.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this thirtieth day of September, A. D. 1908.

(Seal)

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

29 In the Supreme Court of the United States, October term, 1908.

THE UNITED STATES, PETITIONER, v. CARL S. CHAMBERLIN, D. H. RICE, AND TYSON S. DINES, as executors of the last will and testament of Winfield Scott Stratton, deceased.	No. 571.

STIPULATION AS TO RETURN.

It is hereby stipulated by counsel for the parties to the above-entitled cause that the certified copy of the transcript of the record therein now on file in the office of the clerk shall be taken as a return of the clerk of the Circuit Court of Appeals for the Eighth Circuit to the writ of certiorari issued herein.

HENRY M. HOYT,
H.
Solicitor-General.
O. L. DINES,
P. H. HOLME,
Counsel for Respondents.

OCTOBER 24, 1908.

(Endorsed:) No. 2422. United States of America, plaintiff in error, *vs.* Carl S. Chamberlin et al., executors, etc. Stipulation as to return to writ of certiorari from Supreme Court, U. S. Filed Nov. 2, 1908, John D. Jordan, clerk.

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the honorable the judges of the United States Circuit Court of Appeals for the Eighth Circuit, greeting:

[SEAL.]

Being informed that there is now pending before you a suit in which the United States is plaintiff in error and Carl S. Chamberlin, D. H. Rice, and Tyson S. Dines, as executors of the last will and testament of Winfield Scott Stratton, deceased, are defendants in error, which suit was removed into the said Circuit Court of
30 Appeals by virtue of a writ of error to the District Court of the United States for the District of Colorado, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States,

Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 21st day of October, in the year of our Lord one thousand nine hundred and eight.

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

RETURN TO WRIT.

UNITED STATES OF AMERICA,
Eighth Circuit, ss.

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true, and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of The United States of America, plaintiff in error, v. Carl S. Chamberlin, D. H. Rice, and Tyson S. Dines, as executors of the last will and testament of Winfield Scott Stratton, deceased, No. 2422, is a full, true, and complete transcript, with all the pleadings, proceedings, and record entries in said cause.

In testimony whereof I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the city of St. Louis, Missouri, this second day of November, A. D. 1908.

[SEAL.] JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Endorsed:) File No. 21367. Supreme Court of the United States, No. 571, October term, 1908. The United States vs. Carl S. Chamberlin et al., executors, etc. Writ of certiorari. Filed Nov. 2, 1908, John D. Jordan, clerk. Office of the clerk, received Nov. 4, 1908. Supreme Court, U. S.

31 (Endorsed:) File No. 21367. Supreme Court, U. S., October term, 1908. Term No. 571. The United States vs. Carl S. Chamberlin et al., executors, etc. Writ of certiorari and return. Filed Nov. 4, 1908.

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In the Supreme Court of the United States.

OCTOBER TERM, 1908.

THE UNITED STATES, PETITIONER,
v.
CARL S. CHAMBERLIN, D. H. Rice, and Tyson S. Dines, as the executors of the last will and testament of Winfield Scott Stratton, deceased. } No. ——.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF.

The Solicitor-General, on behalf of the United States, respectfully prays for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Eighth Circuit in the above-entitled cause, affirming the judgment of the United States District Court for the District of Colorado.

The questions raised by this petition are whether a stamp tax incurred upon an instrument under the war revenue act of June 13, 1898, and not paid by stamps being purchased and affixed, may be recovered by the United States in an action of debt; and whether section 31 of the war revenue act made applicable to that act certain preexisting provisions of law respecting the bringing of suits to enforce the collection of taxes.

57251—08

In May, 1899, W. S. Stratton executed a deed of conveyance, naming as the consideration $4,850,000, and affixing stamps to the value of $4,850, due under the war revenue act of 1898. Some years later the Government ascertained that the true consideration was $9,733,000, more than twice the sum named in the conveyance, and that stamps to the value of $4,883 in addition to those already on the deed should have been affixed. Stratton having in the meantime died, suit was brought by the United States against his estate to recover the sum of $4,883. The District Court for the District of Colorado sustained a demurrer to the petition, and on writ of error the Circuit Court of Appeals affirmed that judgment, holding (Philips, District Judge; Sanborn, Circuit Judge; Hook, Circuit Judge, filing a dissenting opinion) that the Government can not maintain an action of debt for the recovery of such tax, unless specially authorized by statute; that a tax in its essential characteristics is not a "debt," and that the war revenue act gave no right of action for the collection of such stamp taxes, but, on the contrary, manifested an intention to limit the means of enforcing payment to the penal provisions contained therein. (*United States* v. *Chamberlin*, 156 Fed. Rep., 881.)

The Government believes that view of the law is erroneous, and contends (1) that the United States has the inherent right, independent of statutory authority, to sue for the collection of all taxes

due, and (2) that, however, authority is given to the United States by the war revenue act to maintain an action for the recovery of stamp taxes imposed thereunder.

I.

The tax in question was assessed under section 6 of the war revenue act (30 Stat., 448, 451), which provided:

> That on and after the first day of July, eighteen hundred and ninety-eight, there shall be levied, collected, and paid for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this act * * * the several taxes or sums of money set down in figures against the same, respectively, or otherwise specified or set forth in the said schedule. * * *

Under Schedule A appears the following (id., 460):

> Conveyance: Deed, instrument, or writing, whereby any lands, tenements, or other realty sold shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or purchasers, or any other person or persons, by his, her, or their direction, when the consideration or value exceeds one hundred dollars and does not exceed five hundred dollars, fifty cents; and for each additional five hundred dollars or fractional part thereof in excess of five hundred dollars, fifty cents.

The tax was imposed and was due on the actual consideration, and it became due and owing to the Government from the moment that the instrument was issued. In this respect these taxes are precisely like tariff duties, which accrue at the date of the importation of dutiable articles. There can be no difference in principle between the liability to affix stamps and the liability to pay any other taxes on an ordinary assessment. Between stamp taxes and other taxes there is a difference in incidents, but no difference in nature. The duty is as clear and the amount is due as much in one case as in the other. It is absurd to say that because the act provides that the tax shall be collected by the sale of stamps the Government has no power to demand or accept money in lieu of stamps which the maker of an instrument neglected to place thereon. The object of the war revenue act was to raise revenue to meet the expenditures of the Government in its war with Spain; the use of stamps was a mere matter of convenience; it was the revenue arising from their sale that the Government desired and required, and whenever a document was issued on which the law assessed stamps, but which was unstamped or insufficiently stamped, the United States was deprived of that amount of the tax and the deficiency was a debt due to the United States in dollars and cents from the maker of the document.

The weight of authority, and especially of the cases in this court, is in favor of the view that any

tax is a debt from the citizen to the state, the payment of which may be enforced. That is the doctrine of the English law. Blackstone reflects the growth of it in the past by the statement: "Whatever, therefore, the laws order any one to pay, that becomes instantly a debt which he hath beforehand contracted to discharge." (3 Bl. Com., 160.) Informations of debt to recover duties on importations were frequent, even where Parliament had provided a different remedy for enforcing the payment. "So debt lies * * * for customs due for merchandise, though the goods are forfeited for non-payment." (3 Comyns Dig., 339, citing 1 Rolle, 383.)

This established practice was referred to, and other English authorities cited, in *Dollar Savings Bank* v. *United States*, 19 Wall., 227, the leading decision in this court on which the Government relies in support of its contention. That was an action of debt brought by the United States against the savings bank to recover certain internal revenue taxes under section 9 of the act of July 13, 1866 (now section 3213, R. S., which will be referred to later). The court used the following language in answering the contention that the suit was not properly brought:

> The argument in support of the assignment of error is that the United States has no common law; that the thirty-fourth section of the judiciary act enacts that the laws of the several States shall be the rules of

> decision in the trial of actions at common law, of which debt is one; that the act of Congress which imposes the tax on savings banks provides a special remedy for its assessment and collection, and that it is a principle of the common law of Pennsylvania, that when a statute creates a right and provides a particular remedy by which that right may be enforced, no other remedy than that afforded by the statute can be used.

The court, conceding that to be the rule of the common law in England and in many of the States, goes on to show upon what the rule is founded, as follows:

> The reason of the rule is that the statute, by providing a particular remedy, manifests an intention to prohibit other remedies, and the rule, therefore, rests upon a presumed statutory prohibition. It applies and it is enforced when any one to whom the statute is a rule of conduct seeks redress for a civil wrong. He is confined to the remedy pointed out in the statute, for he is forbidden to make use of any other. But by the internal-revenue law, the United States are not prohibited from adopting any remedies for the recovery of a debt due to them which are known to the laws of Pennsylvania. The prohibitions, if any, either express or implied, contained in the enactment of 1866, are for others, not for the Government. They may be obligatory upon tax collectors. They

> may prevent any suit at law by such officers or agents. But they are not rules for the conduct of the State. It is a familiar principle that the king is not bound by any act of parliament unless he be named therein by special and particular words. * * * He may even take the benefit of any particular act, though not named. The rule thus settled respecting the British Crown is equally applicable to this Government, and it has been applied frequently in the different States, and practically in the Federal courts. * * *

And the court concludes:

> The Government is not prohibited by anything contained in the act of 1866 from employing any common-law remedy for the collection of its dues. The reason of the rule which denies to others the use of any other than the statutory remedy is wanting, therefore, in applicability to the Government, and the rule itself must not be extended beyond its reason.

The cases of *United States* v. *Lyman*, 1 Mason, 482, and *Meredith* v. *United States*, 13 Pet., 486, holding that the Government was entitled to this remedy, were also referred to by the court with approval. In deciding the latter case Mr. Justice Story said (13 Pet., 493):

> It appears to us clear upon principle as well as upon the obvious import of the provisions of the various acts of Congress on this subject, that the duties due upon all

> goods imported constitute a personal debt due to the United States from the importer. * * * independently of any lien on the goods and any bond given for the duties.

In the present case the Circuit Court of Appeals held that the language of the court in *Savings Bank* v. *United States*, above quoted, was *obiter dicta*, because the statute imposing the tax there under consideration provided that it could be recovered by suit at law. The conclusion of the Supreme Court, however, was based on two distinct grounds, general principles of law, and a provision of the statute applying to the particular case. As was said by Mr. Justice Brewer in *Union Pacific Co.* v. *Mason City Co.* (199 U. S., 166):

> Where there are two grounds, upon either of which the judgment of the trial court can be rested, and the appellate court sustains both, the ruling on neither is *obiter;* but each is the judgment of the court, and of equal validity with the other.

That the doctrine of the *Savings Bank* case has been recognized as controlling is clearly shown by the following cases: *United States* v. *Hazard*, Fed. Cas. 15,337; *United States* v. *Dodge*, 1 Deady, 124; *United States* v. *Cobb*, 11 Fed. Rep., 76; *United States* v. *Tilden*, 9 Ben., 368; *United States* v. *Washington Mills*, 2 Cliff., 601; *United States* v. *Phelps*, 1 Blatchf., 312. The majority of these cases were actions of debt to recover internal revenue taxes, and several of them refer with ap-

proval to the decision in the *Savings Bank* case as upholding the right to such actions. Thus in *United States* v. *Tilden*, 9 Ben., 368, Judge Blatchford discussed that decision exhaustively and expressly disposed of the contention that certain portions of the opinion were *obiter*. In *King* v. *United States*, 99 U. S., 229 (which involved a different question, however), the court referred with approval to the ruling in the *Savings Bank* case; and in *United States* v. *Erie Ry. Co.*, 107 U. S., 2; *United States* v. *Reading R. R.*, 123 U. S., 113, and *United States* v. *Snyder*, 149 U. S., 210, the court stated what had been decided in that case, without comment but certainly without disapproval.

No decision of the Supreme Court throws any doubt on the controlling authority of *Savings Bank* v. *United States*. The earlier case of *Lane County* v. *Oregon*, 7 Wall., 71, only decided that by the statutes of Oregon certain taxes were required to be paid in gold and silver coin, and that Congress in the legal-tender acts did not, in using the word "debts," refer to taxes imposed by State authority. In *Meriwether* v. *Garrett*, 102 U. S., 472, which did not involve the question presented here, Mr. Justice Field in a concurring opinion cited *Lane County* v. *Oregon* in support of his broad statement that "taxes are not debts." It may be observed, however, that Justice Miller, one of the concurring justices for whom Justice Field spoke, delivered the opinion in *United States* v. *Pacific R. R.*, 4 Dill., 66, in which he referred to the ruling in the

Savings Bank case that, for the purposes of collection, the tax was a debt and could be so collected, and said that "it is immaterial what you call the obligation of a citizen to pay his taxes. It is very clearly an obligation which may be enforced by the courts."

As to the cases of *Crabtree* v. *Madden*, 54 Fed. Rep., 426; *Fleshman* v. *McClain*, 105 Fed. Rep., 610, and *McClain* v. *Fleshman*, 106 Fed. Rep., 880, referred to in the opinion of the Circuit Court of Appeals, it need only be stated that the first of these cases, in which it was said that taxes are not debts, was an action brought to enforce the collection in a United States court in the Indian Territory of a tax imposed by Indians residing therein upon a citizen of the United States. As was said by Circuit Judge Hook in his dissenting opinion in the present case (156 Fed. Rep., 895), it was "an attempt to collect in the courts of one sovereignty taxes levied under the laws of another."

McClain v. *Fleshman* was an action to recover from the collector of internal revenue taxes imposed under section 6 of the war revenue act. The Circuit Court and the Court of Appeals, in holding that the stamp duty imposed by the act was to be collected by the Government through the sale of the required stamps, and that in the absence of an express provision therefor the collector was not authorized to collect the duty in any other manner, cited only the case of *Meriwether* v. *Garrett* to sustain their view, and there is nothing in either of

the opinions to show that the *Savings Bank* case and the other decisions to the same effect were brought to the courts' attention.

It is submitted that these opinions can not impair the well established and recognized authority of *Savings Bank* v. *United States*.

II.

The Government contends, however, that a right of action to recover this tax is expressly given by the war-revenue act.

A disability and a penalty were attached to a violation of the law, and were intended to compel obedience; but it is impossible to conceive that this was the limit of the Government's right or the exclusive remedy. The violation of the law fell short of a criminal offense, and there is no reason to suppose that the civil liability was merged in the quasi-criminal penalty, except the fact, as alleged, that no express authority to bring suit to compel the payment of the tax or to recover is conferred by the law. Even where there is an actual and technical misdemeanor involving a civil liability to the State or a private party, the two remedies proceed *pari passu*. Prosecution for the penalty or punishment does not preclude the enforcement of the civil demand. This is well illustrated by the laws relating to prosecutions for smuggling, fraudulent customs undervaluations, etc.

Section 7 of the war revenue act provided that if any person should make or issue a document without affixing thereto the stamps required by the law, such person should be deemed guilty of a misdemeanor, and upon conviction should pay a fine of not more than $100, and in addition such document should not be competent evidence in any court. Sections 10 and 13 imposed a penalty on omissions to stamp documents with intent to evade the provisions of the act (which is not charged here); and sections 14 and 15 declared that no paper required by law to be stamped, which had been issued without being duly stamped, or with a deficient stamp, should be recorded or admitted or used in evidence in any court until the proper stamps had been affixed.

Sections 14 and 15 do not operate as a penalty on the grantor in a deed. When he has received the consideration for his property he does not concern himself with the recording of the deed or its admission thereafter as evidence. Nor is the provision against recording an unstamped or insufficiently stamped instrument effectual, because the recorder can not know the actual consideration, and the deed is as a matter of course recorded whether stamped properly or not. Again, the provision against receiving the deed in evidence is inefficacious as a means to force compliance with the law, because Congress can not make rules of evidence for State courts, and Congress must have known when the act was passed that

many States had denied its power to disqualify an unstamped instrument as evidence in their courts. (See *Latham* v. *Smith*, 45 Ill., 29; *Moore* v. *Moore*, 47 N. Y., 467; *Clemens* v. *Conrad*, 19 Mich., 170; *Moore* v. *Quirk*, 105 Mass., 49; *Davis* v. *Richardson*, 45 Miss., 499; *Wallace* v. *Craven*, 34 Ind., 534.) So that the only penalty which would really fall upon the grantor in a conveyance would be that imposed by section 7, and it is obvious that Congress could not have intended to limit the Government's means of enforcing the tax to the imposition of a fine of $100 which would operate as a payment of the tax and a release from further liability. Comparison of that amount with the sum which the Government was entitled to and sued for in this case, $4,883, is sufficient answer to that contention.

Congress, then, perceiving the inadequacy of the penalties and disabilities imposed as a coercive means, made applicable to the war revenue act, by section 31, preexisting statutory enactments providing for actions at law as a means of collecting the taxes levied. Section 31 reads as follows:

> That all administrative, special, or stamp provisions of law, including the laws in relation to the assessment of taxes, not heretofore specifically repealed, are hereby made applicable to this act.

The language of this section may appear slightly ambiguous, but when examined it will be found

clear enough to sustain the Government view. The internal-revenue act of June 30, 1864 (13 Stat., 223), levied stamp taxes similar to those of the war revenue act of 1898, and authorized actions for the recovery of fines, penalties, and forfeitures imposed by that act (sec. 41). The act of July 13, 1866 (14 Stat., 98, 111), extended the right of action authorized by section 41 to fines, penalties, and forfeitures prescribed by any law, and to the taxes themselves. The sections imposing stamp taxes were subsequently repealed, but the provision authorizing actions for the recovery of taxes remained and is now section 3213, Revised Statutes, which is as follows:

> It shall be the duty of the collectors, in their respective districts, subject to the provisions of this title, to prosecute for the recovery of any sums which may be forfeited by law. All suits for fines, penalties, and forfeitures, where not otherwise provided for, shall be brought in the name of the United States, in any proper form of action, or by any appropriate form of proceeding, qui tam, or otherwise, before any circuit or district court of the United States for the district within which said fine, penalty, or forfeiture may have been incurred, or before any other court of competent jurisdiction; *and taxes may be sued for and recovered in the name of the United States, in any proper form of action, before any circuit or district court of the United States for the district within*

> *which the liability to such tax is incurred*, or where the party from whom such tax is due resides at the time of the commencement of the said action.

Manifestly this is one of the "administrative" provisions of law which were adopted and made applicable to the war revenue act by section 31. It was on the statute books when Congress passed that act, and formed part of the complete and comprehensive system for the collection of taxes which had long existed and was well known to Congress. That in adopting "administrative" provisions of law in respect of taxes Congress included those providing ways and means of collection is evident from a reference to the committee report and the debates on the bill; and this court has said that it may properly resort to the proceedings in Congress in order to ascertain the reason as well as the meaning of particular provisions in an act. (*United States* v. *Union Pacific R. R. Co.*, 91 U. S., 72, 79; *American Net & Twine Co.* v. *Worthington*, 141 U. S., 468, 474; *The Delaware*, 161 U. S., 459, 472.) The House report on the bill (No. 1183, 55th Cong., 2d sess.) stated that these were all taxes on objects which were assessed during or subsequent to the civil war and therefore opened up no new or untried system of taxation, and that they could be collected by the existing internal-revenue officials slightly increased, with a small additional expense. And in the debate in the House

Mr. Dingley, who had submitted the report, said in explanation of the scope of the act that they had restored the adhesive stamp which existed from 1864 to 1872, placing it in large part on the basis of the law as it stood in 1866, with certain additions (31 Cong. Rec., p. 4298, 55th Cong., 2d sess.); and again: "These taxes have been selected, first, because we have the machinery for the collection of them now, and they can be collected with but slight additions to the force and with but slight increase of expense. We have selected them also because they were a source of revenue successfully seized upon during the civil war" (id., p. 4297).

It is submitted with confidence that in thus reviving the old war taxes of 1866 Congress intended also, by enacting section 31, to adopt the same means used then for the enforcement of their collection.

The fact that these taxes have been repealed does not affect the importance of this question as involving the Government's sovereign right to sue for the recovery of taxes which it has lawfully imposed.

It is respectfully submitted that the writ of certiorari should issue.

HENRY M. HOYT,
Solicitor-General.

OCTOBER, 1908.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

UNITED STATES, PETITIONER,
v.
CARL S. CHAMBERLIN, D. H. RICE, TYSON S. DINES, as executors of the last will and testament of Winfield Scott Stratton, deceased. } No. 77.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The questions presented by this case are whether a stamp tax incurred upon an instrument under the war revenue act of June 13, 1898 (30 Stat., 448), and not paid, may be recovered by the United States in an action of debt; and whether section 31 of the war revenue act made applicable to that act certain pre-existing provisions of law respecting the bringing of suits to enforce the collection of taxes.

The case is presented by a demurrer to a complaint of the United States filed in the District Court for the District of Colorado. The District Court sustained the demurrer without opinion, and the Circuit Court of Appeals affirmed (Hook, circuit judge, dissenting) (*U. S.* v. *Chamberlin,* 156 F. R., 881).

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The complaint alleged that on or about the 23d day of May, 1899, one Winfield Scott Stratton, sold and conveyed to a corporation known as "Stratton's Independence Limited," certain lands situate in the Cripple Creek mining district in Teller County, Colorado (Rec., 1), for an actual consideration of $9,733,000, although the deed recited the consideration to be $4,850,000, and the amount of taxes paid on account of the instrument (and evidenced by stamps affixed thereto), was only $4,850, whereas it should have been $9,733 (Rec., 2); that on September 14, 1902, said Stratton died testate and appellees herein were appointed executors of his estate; that the delinquent taxes mentioned have never been paid, although they had been duly assessed by the Commissioner of Internal Revenue (Rec., 3) and although demand had been made upon said executors for them (id.); and that therefore this proceeding is instituted at the direction of the Commissioner of Internal Revenue for their collection (id.).

The demurrer to this complaint is general. (Rec., 6.)

Section 6 of the aforesaid war-revenue act provides:

> That on and after the first day of July, 1898, there shall be levied, collected, *and paid* for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this act, or for or in respect of the vellum, parchment, or paper upon which such instrument, matters, or things, or any of

> them, shall be written or printed, *by any person or persons or party* who shall make, sign, or issue the same, or for whose use or benefit the same shall be made, signed, or issued, the several taxes or sums of money set down in figures against the same, respectively, or otherwise specified or set forth in the said schedule.

The amount of the tax on deeds as fixed by Schedule A (30 Stat., 460), is 50 cents, in case the consideration is from one to five hundred dollars, and 50 cents for each additional five hundred dollars, or fraction thereof. These are all the provisions which have to do with the imposition of the tax.

With reference to the administration of the law, section 31 of the act provides:

> That all *administrative*, special, or stamp provisions of law, including the laws in relation to the assessment of taxes not heretofore specifically repealed, are hereby made applicable to this act.

Revised Statutes, section 3213, provides that:

> Taxes may be sued for and recovered in the name of the United States, in any proper form of action, before any circuit or district court of the United States for the district within which the liability to such tax is incurred, or where the party from whom such tax is due resides at the time of the commencement of said action.

The contentions of the Government are:

First. That the war-revenue act of 1898 created a personal obligation to pay these taxes, which obliga-

tion is enforcible by this action at least in the absence of a provision to the contrary in the war-revenue act itself.

Second. That the war-revenue act does not, either expressly or by implication, forbid this method of collecting these delinquent taxes due under it.

Third. That instead of forbidding resort to this method of collecting these delinquent taxes the act, by section 31, explicitly authorizes it.

ASSIGNMENTS OF ERROR.

1. That the court erred in holding the contrary of each of the above contentions.

2. That the court erred in holding that the complaint did not state a cause of action.

ARGUMENT.

Reference is particularly made to the argument of the dissenting judge below (Rec., pp. 31–39), and to the Government's brief filed in this court on the petition for writ of certiorari.

FIRST.

The war-revenue act of 1898 created a personal obligation to pay these taxes, which obligation is enforcible by this action at least in the absence of a provision to the contrary in the war-revenue act itself.

I.

The obligation here was a personal one *to pay* and not merely an obligation of the things taxed, or of the owner to affix stamps.

The war-revenue act, in express terms, makes the stamp taxes imposed by it personal obligations. Its language is (sec. 6):

> There shall be levied, collected, *and paid* * * * *by any person or persons or party* who shall make, sign, or issue the same, or for whose use or benefit the same shall be made, signed, or issued the several taxes or sums of money * * * specified in Schedule A in respect of the documents therein mentioned.

Thus the law says not merely that the Government shall levy and collect, but that *this defendant shall pay.*

The complaint says to the defendant: "You have *not paid.*"

"Whatever," says Blackstone, "the laws order anyone to pay, that becomes instantly a debt which he hath beforehand contracted to discharge." (3 Bl. Com., 160.)

Is not a court of the United States bound to enforce performance of this plain, direct mandate of the law thus addressed to this defendant?

The case was considered by the majority of the court below as if the statute had not at all directed the defendant to pay, but had merely directed the Government to levy and to collect, and that only so far as a mere demand with possibility of criminal prosecution might be effective.

The statutory language *here involved* is almost the identical language which was held in *Meredith* v. *United States* (13 Pet., 486, 493) and in *U. S.* v. *Lyman* (1 Mason, 482), to create a personal

obligation to pay customs duties. Such difference as there is between the language before the court in those cases and the language of the war revenue act makes it even more clear in our case than it was in the others that there is a personal obligation; for the statute before the court in those cases stated only that—

> There shall be levied, collected and paid the several duties prescribed by the act *on goods imported into the United States*—

while here the statute expressly states that the tax shall be paid by the *person* who makes, or is benefited by the instrument in respect of which the tax is laid. There is nothing in the fact that the present tax is a stamp tax which creates a distinction. The stamps are used merely as evidences of the payment of the tax, and they are so used because they afford the most convenient way of showing payment of the tax which has thus far been thought of. If this were not already obvious, it would be deducible from the act itself, for throughout it is found the phrase "stamps *denoting* the tax," and other like expressions.

The reasoning of the court in the *Meredith* case was as follows:

> The first question is, whether Smith & Buchanan were ever personally indebted for these duties; or, in other words, whether the importers of goods do, in virtue of the importation thereof, become personally indebted to the United States for the duties due thereon; or the remedy of the United States is exclu-

sively confined to the lien on the goods and the security of the bond given for the duties. It appears to us clear, upon principle, as well as upon the obvious import of the provisions of the various acts of Congress on this subject, that the duties upon all goods imported constitute a personal debt due to the United States from the importer (and the consignee for this purpose is treated as the owner and importer), independently of any lien on the goods and any bond given for the duties. The language of the duty act of the 27th of April, 1816, chapter 107, under which the present importations were made, declares that "there shall be levied, collected, and paid" the several duties prescribed by the act on goods imported into the United States. And this is a common formulary in other acts laying duties. Now, in the exposition of statutes laying duties it has been a common rule of interpretation, derived from the principles of the common law, that where the duty is charged on the goods the meaning is that it is a personal charge on the owner, by reason of the goods. So it was held in *Attorney-General* v. ——— (2 Anstr., 558), where a duty was laid on mash in a still; and it was said by the court that where duties are charged on any articles, in a revenue act, the word "charged" means that the owner shall be debited with the sum, and that this rule prevailed even when the article was actually lost or destroyed, before it became available to the owner. Nor is there anything new in this doctrine; for it has long been held that in all such cases an action of debt lies

> in favor of the Government against the importer for the duties whenever, by accident, mistake, or fraud, no duties or short duties have been paid.

II.

This personal obligation *to pay* created by the act imposing the tax, whether the tax be of one or another sort, is enforcible by any appropriate civil action, even though the taxing statute does not contain a specific grant of authority to proceed in that way.

This was directly the point of the *Meredith* and *Lyman* cases *supra*. They both upheld common law actions of assumpsit for customs duties, *even though there was at that time no statute explicitly authorizing suits for the recovery of customs duties*, and even though the Government had waived its statutory lien upon the goods by delivering them to the owners, upon the execution of a bond for the payment of the duties on them, and even though the Government had means of *punishing* the violation of the law.

Mr. Justice Story, in the *Lyman* case, stated the basis of the decision on this point as follows:

> The first question is whether an action of debt lies in this case. By the common law an action of debt is the general remedy for the recovery of all sums certain, whether the legal liability arise from contract or be created by a statute. And the remedy as well lies for the Government itself as for a citizen. And where the debt arises by statute an action or informa-

tion of debt is the appropriate remedy, unless a different remedy be prescribed by the statute.

In respect to the duties payable upon the importation of goods, the usual proceedings, where no specialty has been taken as security, is an information of debt, which is emphatically called the king's action of debt. But where a discovery or account is wanted, either of the nature or of the value of the goods imported, an exchequer information, in the nature of a bill in equity, for a discovery and account, is generally resorted to. And informations of either kind are very common in cases where goods have been smuggled or where, by accident, mistake, or fraud, short duties only have been paid. The general principle upon which these informations rest is that in the given case the common law or the statute creates a debt, charge, or duty in the party personally to pay the duties immediately upon the importation, and that, therefore, the ordinary remedies lie for this, as for any other acknowledged debt due to the crown. And it is a general rule in the construction of revenue statutes that if a duty is charged on any article the word "charged" means that the owner shall be personally debited with that sum.

These doctrines fully apply to the case now before the court. The act of 27th of April, 1816, chapter 107, on which this action is founded, and which, in this request, follows the language of the former acts upon the same subject, declares that "there shall be levied, collected, and paid the several duties thereinafter

> mentioned" on the goods therein enumerated, when imported into the United States. And it has been repeatedly settled, both here and in England, that under such circumstances the duties are a debt accruing to the Government from the time of the actual importation.

In a subsequent case in which the same point was raised Mr. Justice Story stated that he "deliberately adhered" to this opinion, and he added:

> To say that the United States can not recover duties not paid to them, by any action, is in effect to assert that they have rights without a remedy. If there is any remedy, it is an action or information of debt. (*U. S.* v. *Hathaway*, 3 Mason, 324, 325–326.)

The doctrine was again announced in *Dollar Savings Bank* v. *United States* (19 Wall., 227), a suit to collect unassessed internal-revenue taxes, in which the question was again presented and the opposite view again earnestly pressed. It is urged that what was said in this case on this subject was dictum, but it was not. In the first place, although it is true that the court held that the statute then before it (being the same provision now found in section 3213, Revised Statutes), expressly authorized the collection of the tax by suit, yet the question whether or not an action would lie in the absence of statute, was in terms raised by the assignment of error, and the question was fully argued and carefully considered. The decision was placed as much on the one ground as on the other. Under such circumstances the utterances of the court on the one point were quite as authoritative as on

the other. This court so ruled in *Union Pacific Co.* v. *Mason City Co.* (199 U. S., 160), in which case it said:

> Of course, where there are two grounds, upon either of which the judgment of the trial court can be rested, and the appellate court sustains both, the ruling on neither is *obiter*, but each is the judgment of the court and of equal validity with the other. Whenever a question fairly arises in the course of a trial, and there is a distinct decision of that question, the ruling of the court in respect thereto can, in no just sense, be called mere dictum. (*Railroad Companies* v. *Schutte*, 103 U. S., 118.)

In the second place, what was said in reference to the right to maintain a common-law action was really necessary to the decision of the case. The suit had been brought without any assessment of the tax having previously been made, although the taxing statute provided (by reference to general law) that the taxes should be assessed. The claim was not generally that the statute did not authorize suits for taxes, but specifically that it did not authorize such suits for *unassessed* taxes, and in holding that a suit would lie for taxes, though not authorized by statute, the court was disposing of the contention that *assessment* was necessary in any event. Having so disposed of that contention, there was no room left to question the applicability of the provision of the statute authorizing suit.

The principle of the *Savings Bank* case had been previously applied by this court in *Stockwell* v. *United States* (13 Wall. 531), where it was held that debt lay

to enforce the right of the Government under a statute providing that a receiver of smuggled goods should on conviction forfeit double the value of the goods. The court said:

> Debt lies whenever a sum certain is due to the plaintiff or a sum which can readily be reduced to a certainty—a sum requiring no future valuation to settle its amount. It is not necessarily founded upon contract. It is immaterial in what manner the obligation was incurred or by what it was evidenced if the sum owing is capable of being definitely ascertained.

Chaffee v. *United States* (18 Wall. 516), likewise prior to the *Savings Bank* case, was to the same effect and on the same reasoning (p. 538).

The *Savings Bank* case has been reaffirmed and applied by this court to later cases.

King v. *United States* (99 U. S. 229) is expressly a reaffirmance.

In *United States* v. *Erie Railway Co.*, 106 U. S. 327, an action to recover taxes on interest coupons was sustained on the same authority. In denying an application for a rehearing, the court said: "This suit is, therefore, for the debt which the company owes, to wit, five per cent of the pounds sterling it has paid as interest on its bonds. * * * This is a suit for the recovery of that debt as a debt." (107 U. S. 1, 2.)

United States v. *Reading R. R.* (123 U. S. 113) was a case of assumpsit for internal-revenue taxes. The action was recognized again on the authority of the

Savings Bank case, and it was said that "the controlling question is not what has been assessed but *what is by law due.*"

Still again was the case cited and approved in *United States* v. *Snyder* (149 U. S. 210), where the action was for the recovery of tobacco taxes.

The case and its doctrine have been followed in the following cases in the lower federal courts:

United States v. *George*, 6 Blatch., 406, 416;

United States v. *Phelps*, 17 Blatch., 312;

United States v. *Pacific Railroad*, 4 Dill., 66;

United States v. *Hathaway*, 3 Mas., 324;

United States v. *Cobb*, 11 Fed., 76 (Circ. Ct.);

United States v. *Boyd*, 24 Fed., 670 (Circ. Ct.), where Wallace, J., said:

> It is a very ancient doctrine that debt lies for customs due upon merchandise even if the goods are forfeited for nonpayment of duties.

United States v. *National Fiber Board Co.*, 133 Fed., 597 (Dist. Ct., D. Me.);

United States v. *Mex. Int. R. Co.*, 154 Fed., 519 (Circ. Ct.);

United States v. *Hazard*, Fed. Cas. No. 15337;

United States v. *Dodge*, Deady, 124;

United States v. *Tilden*, 9 Ben., 368;

> In this case Judge Blatchford discussed the *Savings Bank* case exhaustively and expressly disposed of the contention that certain portions of the opinion were *obiter*.

United States v. *Washington Mills*, 2 Cliff., 601.

See also 2 Dillon, Municipal Corporations, § 815.

These cases rest upon a very ancient doctrine of the English common law, that where a tax or impost of any sort was laid by statute or otherwise, there arose a remedy on behalf of the Crown, in the King's courts, by information in debt, an action in the nature of debt, to recover the amount of the tax or impost, and this entirely irrespective of whether the statute provided either a different remedy or no remedy at all. The authority and principle of these cases have been recognized by this court in the *Meredith* case, 13 Peters, at pp. 493, 494, and in the *Savings Bank* case, 19 Wall., at p. 240, and in other cases.

Comyn's Digest stated this doctrine of the English law as follows:

> Debt lies for customs due for merchandise, though the goods are forfeited for nonpayment. R., 1 Rol., 383 (tit. "Debt," A, 9).
>
> Debt lies for the penalty of a by-law, though it be not said by what action it shall be recovered. R., 1 Rol., 599, l. 25 (tit. "Debt," A, 9).
>
> So, debt lies upon any statute which gives an advantage to another for the recovery of it; as, upon the St. 32 H 8, 1, for money devised to be paid out of land. Per Holt, Mod. Ca. 26, (tit. "Debt," A, 9).
>
> Actions upon statute are at the suit of the King only, viz, by indictment or information [in debt].
>
> Where an unappropriated penalty is given, *and no method prescribed by which it shall be*

recovered, it is a debt due to the Crown, and can be sued for only in a court of revenue and not by indictment. *Rex* v. *Malland*, Str. 828 (tit. "Action upon statute," E., 1).

The following English cases applied the principle, all being informations in debt in the Court of Exchequer for duties and other imports and penalties due the Crown:

Atty.-Gen'l. v. *Sewers*, Bunb., 225 (1726);

Att'y.-Gen'l v. *Hatton*, Bunb., 262 (1728);

Att'y.-Gen'l. v. *Weeks*, Bunb., 223 (1726);

Att'y.-Gen'l. v. *Tooke*, Hardr., 334 (1675);

Att'y.-Genl. v. ———, 2 Anstr., 558 (35 Geo. III);

Att'y.-Gen'l v. *Stranyforth*, Bunb., 97 (1721);

Sir William Waller [who was farmer of the privilege and brokerage of wines within the Kingdom of England] v. *Travers*, Hardr., 301 (1674);

Att'y-Gen'l v. *Chitty*, Parker, 37 (1744).

Rex v. *Malland*, Str. 828 (2 Geo. II) is instructive. There was an indictment under a statute for burning place bricks and stock bricks together. There was a demurrer on the ground that though the penalty of 20s. per thousand was given, yet there was no appropriation of it nor any method prescribed in which it should be recovered, "though there was as to all the rest." The court ruled that the 20s. per thousand was in the nature of a debt to the Crown and was "suable for in a court of revenue and not by indictment."

In *Att'y-Gen'l* v. ———, *supra*, McDonald, C. B., in his judgment said, "The 1st section says that

certain duties shall be charged for every gallon of wash. The word charged means that the owner shall be debited with that sum."

This old-established form of action in the King's courts, by the law of England provided for the Crown for the recovery of taxes, became a part of the remedial system of procedure in law and equity referred to and adopted by our Constitution, which provides that "The judicial Power shall extend to all cases in Law and Equity, arising under * * * the Laws of the United States." (Art. III, sec. 2); and, further, "to Controversies to which the United States shall be a Party" (*id.*). Thus, while in England it needed a judicial decision to establish that the King's courts were open to the Crown to recover by some action taxes laid by the Crown, in this country the Constitution has opened the federal courts to the Government to recover by some action taxes laid by the Government, since such a case is one "arising under the laws of the United States" and is a "controversy to which the United States is a party;" and while in England the form of action was established by judicial decision to be information in debt, so here the form of action is one in the nature of debt under the well-established doctrine of the adaptation to the federal judiciary system of the forms of action existing "in law and equity" under the common law.

We have a case arising under the laws of the United States. That law, as has been clearly demonstrated elsewhere herein under principle and authority of this court, created a personal obligation flowing from the defendants to the United States. The defendant became bound under that law to pay a sum certain to the United States, just as clearly as though he had contracted to pay it. He has not paid it.

Can it be doubted that the judicial power of our courts extends to this particular controversy and that the United States may enforce an admitted right by means of a form of action established in the ancient English system of law on behalf of the Government? In no instance where Congress by law confers a right on a private person to recover money as damages or otherwise is it necessary to direct in express terms that he may enforce the right in the courts or to prescribe the form of action for that enforcement. It is enough to create the right; that done, the courts, already equipped with the appropriate form of action, enforce it.

So in general has the right of the Government to sue to enforce its civil rights been recognized as not dependent upon specific act of Congress.

Dugan v. *U. S.*, 3 Wheat., 172;
U. S. v. *Bank*, 15 Pet., 377.

Both of these cases were suits by the United States on negotiable instruments, and in both the court repudiated the suggestion that statutory authority to sue was necessary.

III.

Further, even if an action for the recovery of delinquent stamp taxes were not maintainable upon common-law principles, there is, as was pointed out in the statement, an explicit provision of the Revised Statutes which authorizes such course. It is found in section 3213, which provides that:

> * * * Taxes may be sued for and recovered in the name of the United States in any proper form of action, before any circuit or district court of the United States for the district within which the liability to such tax is incurred, or where the party from whom such tax is due resides at the time of the commencement of such action.

This provision establishes affirmatively the Government's right to proceed by suit for the collection of delinquent stamp taxes; unless, of course, there can be found in the taxing statute some express or implied prohibition against resort to the ordinary and established modes of collecting the tax.

IV.

It results, therefore, that the argument adopted by the court below, that a tax is not a "debt" and consequently is not recoverable by suit, is wholly beside the point. The *name* by which the obligation created by the levy of the tax is called can not be important.

So Mr. Justice Miller said in *U. S.* v. *Pacific Railroad*, 4 Dill, 66, *supra*:

> A good deal of argument has been presented to us upon the question whether an action to recover taxes in an action of debt, and whether an obligation to pay taxes to the Government is a debt. * * * In the view that all of us here take I think, however, that this discussion is immaterial. It is immaterial what you call the obligation of a citizen to pay his taxes; it is very clearly an obligation which may be enforced by the courts.

It may be that liability to a statutory penalty is not a "debt" within the narrowest meaning of that term, and yet the right to recover such penalty by civil suit, in the absence of a prohibition of that course, is indisputable.

But although the irrelevancy of the question whether or not a tax is, technically speaking, a debt seems too clear for argument, it is not improper to call attention to the fact that the cases relied on by appellee do not establish what is claimed for them. These cases are *Lane County* v. *Oregon* (7 Wall, 71); *Meriwether* v. *Garrett* (102 U. S., 472); *Crabtree* v. *Madden* (C. C. A., 8th circuit, 54 Fed., 426).

The *Lane County* case involved the question whether or not a statute of Oregon requiring taxes to be paid in coin conflicted with the federal legal-tender acts, which provided that the United States notes thereby authorized to be issued should be receivable in payment of all *taxes*, *duties*, debts, and demands due to the United States, except duties on

imports, and of all claims against it, except interest on bonds, and should also be lawful money and legal tender in payment of all *debts*, public and private, within the United States, except duties on imports. While it was said in the course of the decision that taxes were not debts *within the meaning of the last clause* of the legal tender act, yet the reason for the statement was not that taxes are not in fact debts, but that, in the court's view, the statute showed on its face an intent not to treat taxes as debts *within the meaning of the stated clause*. The reasoning by which this conclusion was reached was that the language preceding the clause in question *expressly differentiated between taxes and other debts*, and therefore, if the word "debts," as used in the latter clause, were construed as including taxes, the intention of Congress, evidenced by the previous differentiation between taxes and other debts, would be defeated. This view, it was said, gained convincing force through the fact that in some States taxes had been held not to be debts collectible by civil suits, so that Congress must have had in mind the contrariety of the opinion upon the point, and had therefore dealt separately with taxes on the one hand and ordinary debts on the other. That the court itself regarded taxes as debts is shown by the following language, at page 79:

> It is also proper to be observed that a *technical* construction of the words in question [i. e., a construction which would extend them so as to include taxes] might defeat the main purpose of the act * * *

Clearly, therefore, the court regarded taxes as technically debts, and in construing the word "debts" *as used in the statute*, as not including taxes, it did not intend to hold that taxes were not technically debts, but only that they were not so treated by the act.

In *Meriwether* v. *Garrett* the question was whether or not unpaid taxes were assets of a municipality which a court of equity could assess and collect for the benefit of creditors. The court held that they were not, but the reasons for its decision were not given. The conclusion was announced by the court. Three judges filed a concurring opinion and three dissented, and the language so much relied on by appellee, to the effect that taxes are not debts, was not the language of the court at all, but merely the language of the three judges who wrote the concurring opinion. Further than that, it is quite obvious that even the opinion of the concurring judges was based not upon the ground that a tax was not as between the Government and the taxpayer a debt, but was based entirely upon the ground that taxes—

> being mere imposts of the Government, created and continued only by the will of the legislature—have none of the elements of property which can be seized, like debts, by attachment or other judicial process and subjected to the payment of creditors of the dissolved corporation. (See p. 514.)

This becomes quite clear when it is recalled that the creditors were seeking to collect the taxes

against the will of the State, which had expressly enacted that the particular taxes in question should be collected by its own agents. The question was of the political control of the State over its taxes.

In *Crabtree* v. *Madden* the question was merely whether or not an Indian tribe, having in itself full governmental powers, could maintain a suit in a United States court for the recovery of delinquent taxes due it. The court showed that it had never been granted jurisdiction to enforce the collection of taxes levied by Indian tribes and it was said that the tribe could not be aided by the fact that it could maintain in the federal courts an action upon a *contract*, because a tax was not a debt arising out of *contract*. There is nothing in the case which even tends to indicate that the court thought a tax was not in fact a debt which could be sued for in the courts of the sovereignty imposing it.

V.

It follows, therefore, that the Government's right to maintain this action must be upheld, unless something can be found in the war revenue act itself expressly or impliedly forbidding it.

SECOND.

The war revenue act did not, either expressly or by implication, forbid the collection by this action of these delinquent stamp taxes due under it.

There is no pretense that the war revenue act *expressly* prohibits the collection of delinquent stamp taxes by such a suit as this, or in any other manner.

The alleged prohibition is claimed to arise by implication, the ground of such claim being that the act imposes severe penalties upon those who fail or refuse to pay their taxes, and that it must, therefore, be presumed that Congress did not intend to permit the Government to collect the tax, if the fear of punishment was not sufficient to induce the citizen to pay it voluntarily.

This contention is directly contrary to the decisions in the *Meredith* and *Lyman* cases, where the statute provided various punishments, and even gave the Government a right to forfeiture of the whole value of the dutiable goods.

I.

The basis of this contention is a misconception of the rule that where a statute gives a right, and prescribes a remedy, the prescribed remedy is generally construed to be exclusive of all other remedies.

The punitive provisions of this act are not in any sense remedies to make the government whole for its loss of revenue. They are addressed solely to the castigation of the wrongdoer, an entirely different matter. They are mere discipline. No amount of *punishment* will put or could be supposed to put the delinquent taxes into the Government Treasury. *Fear* of punishment might induce the payment of taxes when due; but if notwithstanding the liability to punishment the tax ower refuses payment, then the punishment is no "remedy" to the Government, for it is no way of *collecting* the tax.

This governmental power of punishing is as distinct from any idea of obtaining restitution of these taxes as is a governmental criminal code distinct from the right of a private party to obtain remedial relief for the injuries constituting the crime; as, for example, assault, criminal negligence, libel, and all that line of crimes. In these cases of criminal statutes prohibiting specific acts, under penalty, it has never been doubted that, notwithstanding the sovereign's right to punish, anyone injured by the act which violates the statute may maintain an action for damages. The present case is exactly analogous. The violation of the taxing statute is not only an offense, but it causes pecuniary injury to the Government, and for such injury the Government should have its right of action just as a private citizen would have his action if the injury were to him.

This point is well illustrated by the case of *Beckford* v. *Hood* (7 T. R., 620), in which it was held that the English copyright act did not, by giving a cause of action to a common informer, in case of a copyright infringement, deprive the *holder of the copyright of his action for damages* arising from such infringement. It is true that this court held in *Globe Newspaper Company* v. *Walker* (210 U. S., 356), that the American copyright act prescribed exclusive remedies, but that was because of the very clear evidences found in the act itself of legislative intention to that effect. *Beckford* v. *Hood* was distinguished on that ground; and the *Globe Company* in its turn was simi-

larly distinguished in *U. S.* v. *Stevenson*, 215 U. S., 190.

Mr. Justice Story, in the *Lyman* case, pointed out that the provision for a bond for duties there was not a "remedy" within the rule invoked. He said:

> A remedy as understood in legal phraseology is a mode prescribed by law to impose a duty or redress a wrong, and not an obligation to guarantee a right, or to indemnify against a wrong.

Incidentally it may be observed that these penalties, even if "remedies" at all, were imposed not for failure *to pay the tax* but for failure *to affix the stamps.*

II.

Nor was it the intention of Congress, in making the punitive provisions under this particular act, to renounce the right to collect the tax; or to offer to the person taxed an alternative choice of penalty or tax.

The punishments here provided were as follows for the various forms of violation of the stamp-tax provisions:

By section 7, conviction of misdemeanor, fine of not more than $100, and inadmissibility of the document in evidence.

By section 10, conviction of misdemeanor, and fine of not exceeding $200.

By section 13, conviction of misdemeanor, and fine of not exceeding $50, or imprisonment not exceeding six months, or both; and invalidity of document.

By sections 14 and 15 inadmissibility of the document in evidence.

Nothing here can possibly be deemed to be intended as a *substitute* for taxes. The force of the argument is not affected by the fact that the punishments include *money* fines, for the amount of the fines bears no relation to the amount of the delinquent taxes. The maximum money penalty for failing to pay the tax is $200. In this case the amount of the delinquent tax is $4,850. In any given case, of course, it might be anything. In the *Meredith* and *Lyman* cases, *supra*, the penalties of forfeiture of goods were held not to be substitutes for taxes, even though they would obviously have been much more appropriate for that purpose than these here could possibly be.

It ought never to be presumed that the legislature intended anything which would tend to defeat the very purpose of its legislation; but if it were assumed in this instance that the legislature intended to substitute penalties for proceedings to enforce actual payment of the tax, then there would appear a purpose in Congress to render its taxing statute utterly futile, in many cases at least.

Tax dodging is an offense against the public quite apart from the resulting loss of revenue, and provision for punishment therefore discloses no intent to give

up revenue. It is a fraud, an act immoral in itself, and plainly intended to be punished just as other like acts are punished, for the mere purpose of punishing.

Never in the history of this country has Congress relied on punishment alone as a means of obtaining payment of taxes. There are few, if any, taxes which can be evaded without incurring liability to fines, forfeitures, or imprisonment, and yet Congress has provided in addition, not one, but three different modes of collecting delinquent taxes: (1) By distraint; (2) by chancery proceedings to enforce their lien; and (3) by ordinary suit. What occasion was there in this case to make an exception to the invariable rule? How can it be supposed that in time of war, when the Government's need for money was imperative, Congress would deliberately throw away the remedies which it had always regarded as necessary, even in times of peace? True, much is made of the point that some other taxing statutes, and in particular section 41 of the war-revenue act, relating to the tax on bleached flour, state in terms that the penalties imposed are in addition to the tax itself. It is claimed that the failure so to provide in reference to stamp taxes shows a contrary intent in that case. Instead of that holding true, however, the inference should be the exact reverse, for the frequent declarations that penalties were not intended to take the place of taxes show that Congress has never regarded the imposition of a penalty as a sufficient reason for waiving the right to the taxes themselves. The fact

that the express declaration to that effect is found only in section 41 relating to bleached-flour taxes, and not in any other sections of the war-revenue act is of no significance; because the authorship of the main body of the war-revenue act of 1898, including the documentary stamp tax provision, was entirely different from that of the bleached flour tax provisions. The latter were not in the bill as it passed the House, but were added by Senate amendment No. 210. (See printed copies of bill H. R. 10100, as it passed the House and as amended in the Senate, on file in Senate document room.) The fact of the declaration that the penalties were not intended to take the place of the tax, even though made in reference to only one sort of tax, would seem to be conclusive evidence that Congress had no thought of accepting penalties in lieu of taxes.

III.

But the rule of construction as to exclusive remedies is not applied as against the Government. Like all other rules of statutory interpretation, it is a mere aid toward ascertaining the true legislative intent; and it sometimes runs counter to more important rules of construction, and must then give way. One of these latter rules is that the sovereign is not bound by any legislative act unless there be clear and specific language to that effect. And as a result of the conflict between the two rules, this court has never yet held the *Government* to be limited to one remedy merely because it was the only one

given by the statute creating a right. On the contrary, the decisions have always been the other way.

Meredith v. *United States* (*supra*).
Dollar Savings Bank v. *United States* (*supra*).
Blacklock v. *United States* (208 U. S., 75).
United States v. *Stevenson* (215 U. S., 190).

In the *Meredith* case it was claimed that the Government's only way to collect customs duties was by enforcement of their lien upon the imported goods or by suit on the bond given as security for payment of the duties in case the goods had been surrendered (and the lien thereby waived) upon the execution of such bond; but the court held otherwise.

In the *Dollar Savings Bank* case it was held that taxes could be sued for and recovered like any other debt, although the statute prescribed in detail the course to be followed in collecting such taxes and the statutory steps had not been followed. This decision was put upon the express ground that the Government was not bound by the rule of exclusiveness of the statutory remedy.

In *Blacklock* v. *United States* it was claimed by the mortgagee of certain real estate that a distraint and sale of the same for delinquent internal revenue taxes was void, because, as was alleged, the provision for distraint of property for taxes, contained in the act of 1866, was superseded by the act of 1868 authorizing a suit in equity to enforce a lien; but the court held otherwise. It said (p. 86):

> We are of opinion that the Government correctly interprets the act of 1868. If Con-

gress had intended to prescribe a formal suit in equity as the only mode by which the Government could sell real estate upon which it had a lien for internal-revenue taxes, and upon which private parties also had liens by mortgage or deed of trust, *it would have done so in clear words, particularly as Congress knew at the time of the then existing remedy by distraint.* The words used do not show that Congress intended a suit in equity as exclusive of all other methods in such cases. It seems to have taken care not to so prescribe. The two remedies could well coexist. The act of 1868 declared that the Commissioner of Internal Revenue *may*, "if he deems it expedient," proceed by bill in chancery, without using any words implying a purpose to withdraw from the Government the right then existing to resort to distraint and sale. Congress, we assume, doubtless thought that cases might arise in which it would be desirable that all questions of title to property to be sold for taxes should be cleared up before a sale took place. Hence the provision which authorized but did not require a suit in equity, and which left untouched the right of the Government to proceed by distraint. *We must not be understood as saying that if the words "if he deems it expedient" had not been in the statute, the result would have been different.* But those words are significant as tending to remove all doubt as to the correct interpretation of the statute and make it evident that Congress did not intend to take away the remedy by distraint and make the remedy by

> suit exclusive, but only to give another and cumulative remedy for the enforcement of liens and taxes.

In *United States* v. *Stevenson* it was claimed that the provision of the immigration act authorizing penalties imposed by that statute to be collected by civil suit precluded resort by the Government to indictment for that purpose, but the court denied the contention, saying:

> The rule which excludes other remedies, where a statute creates a right and provides a special remedy for its enforcement, rests upon the presumed prohibition of all other remedies. *If such prohibition is intended to reach the Government in the use of known rights and remedies, the language must be clear and specific to that effect.* (*Dollar Savings Bank* v. *United States*, 19 Wall., 227, 238, 239.)

These decisions should put at rest all question as to the applicability to the *Government* of the rule that statutory remedies are *presumed* to be exclusive.

THIRD.

Instead of forbidding resort to the method of collecting the delinquent taxes invoked in this suit, the act, by section 31, explicitly authorizes it.

I.

Section 31 enacts:

> That all administrative, special, or stamp provisions of law, including the laws in relation to the assessment of taxes, not heretofore specifically repealed, are hereby made applicable to this act.

That this provision was intended to give to the Government the right to resort to any previously prescribed or recognized methods of collecting the taxes imposed by the war-revenue act is shown by several considerations.

1. The term "administrative provisions of law" can not possibly mean anything else than provisions for the administration of the law; and administration of a law means nothing more nor less than its enforcement or execution. The only way in which a *tax* law can be executed or enforced is by *collecting the tax*, and it therefore necessarily results that the term "administrative provisions of law" is exactly synonymous with any such term as, for instance, "provisions of law for the collection of taxes."

2. Equally clear it would seem to be that the expression "stamp provisions of law" can mean nothing else than "provisions of stamp laws," and therefore refers to all enactments relating to stamp taxes. If, however, this be not so, then the only other meaning which can be attributed to the phrase "stamp provisions of law" is "provisions relating to the printing, distribution, sale, affixing, and cancellation of stamps." If such restricted meaning be put upon the phrase "stamp provisions of law," then it can not consistently be argued that the term "administrative provisions of law" means the same thing, for it is a settled rule of statutory construction that—

> When two words or expressions are coupled together, one of which generically includes

> the other, it is obvious that the more general term is used in a meaning excluding the specific one. (*Endlich on Interpretation of Statutes*, sec. 396.)

And as under this rule the term "administrative provisions of law" would not embrace provisions relating merely to the printing, sale, and use of stamps, it would necessarily have to be construed as relating to the only other administrative provisions applicable to stamp-tax laws, viz, those providing for the collection of delinquent taxes.

3. The war revenue act contains absolutely no provision for the administration of those sections relating to stamp taxes. Indeed, if it were not for the words "stamp taxes" used as a *heading* under Schedule A, it would not even be known that the taxes were intended to be paid by the use of stamps. This makes it plain that section 31 was intended to extend to these new stamp taxes the existing provisions of the internal-revenue law, *for the administration of taxes of that kind;* because otherwise there would not be statutory authority, *even for the printing and sale of stamps.*

But if the act made *any* of the administrative provisions of the general internal-revenue law applicable to these new stamp taxes it made *all* of them so applicable. It says so, and there is nothing to contradict this statement, either in the history or in the subsequent language of the act. By what authority can it be claimed that by the term "*all* administrative provisions of law" Congress did not mean what

it said, but meant only such provisions as would not aid the Government in collecting delinquent taxes?

II.

Since section 31 authorized resort to *all* existing provisions of law for the collection of taxes, it necessarily empowered the Government in collecting delinquent stamp taxes, to avail itself of the provisions of the Revised Statutes already referred to, which, for the sake of convenience, are here quoted, so far as they are pertinent to the matter in hand:

> SEC. 3182. The Commissioner of Internal Revenue is hereby authorized and required to make the inquiries, determinations, and assessments of all taxes and penalties imposed by this title, or accruing under any former internal revenue act, *where such taxes have not been duly paid by stamp* at the time and in the manner provided by law, and shall certify a list of such assessments when made to the proper collectors respectively, who shall proceed to collect and account for the taxes and penalties so certified. * * *
>
> SEC. 3183. It shall be the duty of the collectors, or their deputies, in their respective districts, and they are hereby authorized to collect all the taxes imposed by law, however the same may be designated. And every collector or deputy collector shall give receipts for all sums collected by him.
>
> SEC. 3187. If any person liable to pay any taxes neglects or refuses to pay the same within ten days after notice and demand, it shall be

lawful for the collector or his deputy to collect the said taxes, with five per centum additional thereto, and interest as aforesaid, by distraint and sale, in the manner hereafter provided, of the goods, chattels, or effects, including stocks, securities and evidences of debt, of the person delinquent as aforesaid. * * *

SEC. 3207. In any case where there has been a refusal or neglect to pay any tax, and it has become necessary to seize and sell real estate to satisfy the same, the Commissioner of Internal Revenue may direct a bill in chancery to be filed, in the district or circuit court of the United States, to enforce the lien of the United States for tax upon any real estate, or to subject any real estate owned by the delinquent or in which he has any right, title, or interest, to the payment of such tax. * * *

SEC. 3213. * * * *Taxes may be sued for and recovered in the name of the United States, in any proper form of action, before any circuit or district court of the United States for the district within which the liability to such tax is incurred, or where the party from whom such tax is due resides at the time of the commencement of said action.*

And it follows that section 31, by making these provisions applicable to the taxes levied by the war-revenue act, explicitly authorized the collection of such taxes by such a suit as the present one.

III.

The various suggested reasons for adopting a different construction of section 31 may be disposed of briefly:

1. It is said that because section 31 appears under the heading "Legacies and distributive shares of personal property" it should be construed as relating to inheritance taxes alone. If this be so, then section 28, which comes under the heading "Excise taxes on persons, firms, companies, and corporations engaged in refining petroleum and sugar" must be construed as imposing a tax on one or the other of those businesses, although it purports to impose taxes on parlor-car seats and sleeping-car berths; likewise it must be true that section 51, which comes under the heading "Tea," only postpones the time of the taking effect of the act in respect to the tax on tea.

The examination of section 31 and of the succeeding sections shows the inartistic arrangement of the act.

Further, if it be true that section 31 applies only to inheritance taxes, then Congress is convicted of the absurdity of making all "stamp provisions of law" applicable to the administration of taxes not payable in stamps.

And finally, the argument ignores the explicit statement that the provisions of law referred to are made applicable not to particular sections, but to the whole "act."

2. It is insisted that the insertion of the phrase "including the laws in relation to the assessment of taxes" immediately after the phrase "administrative, special, and stamp provisions of law" shows that Congress intended that section 31 should not relate to the collection of taxes, but only to what the Court of Appeals calls "matters that are ministerial, administrative, or executive." Why ministerial, administrative, or executive matters do not embrace collection of taxes, when the only way in which the law can be administrated is by collecting them, is not pointed out. But, aside from this, these two answers to the proposition may be made: (1) The use of the word "including" at the beginning of the phrase shows that Congress did not intend by the introduction of such phrase to limit the scope of the preceding language. The use of the word "including" indicates that Congress understood that laws relating to the assessment of taxes were comprehended by the preceding language, and made specific reference to such laws only as a matter of extra precaution. (2) There could be no possible reason for authorizing the *assessment* of the taxes if it was not intended that they should be subsequently *collected*. This is especially true of stamp taxes. *There is no occasion to assess them until they are delinquent;* yet they are undoubtedly assessable under section 31, for the phrase "including the laws in relation to the assessment of taxes" undoubtedly makes section 3182, above quoted, and which authorizes

assessment of taxes not duly paid *by stamp* when due, applicable to the present act. Is Congress to be convicted of the absurdity of providing that delinquent stamp taxes shall be assessed, but at the same time of prohibiting their *collection* when assessed?

3. Finally, it is said that persuasive evidence that Congress did not intend to permit the collection of delinquent stamp taxes is found in the fact that the repealing act of 1902 (32 Stat., 97) expressly kept in force section 30 of the act relating to the collection of inheritance taxes, but did not say anything about the collection of other kinds of taxes. But this argument has no force when it is remembered that persons from whom inheritance taxes were due were allowed a year in which to pay them, and that, therefore, although such taxes might have been imposed prior to the repeal of the act, yet if section 30 had not been kept alive, there would have been no machinery for their collection. Such, however, was not the case in reference to the documentary taxes. They became both payable and delinquent the moment the document was issued without being stamped, and Congress therefore had no reason to make special provision for their collection. It doubtless assumed that all citizens had dutifully paid their taxes when due; but if not, then it knew the Government's right to collect them was sufficiently preserved by section 3213 of the Revised Statutes. (*Hertz* v. *Woodman*, 218 U. S., 205.)

CONCLUSION.

The judgment of the Court of Appeals should be reversed and the case remanded for further proceedings.

WINFRED T. DENISON,
Assistant Attorney-General.

BARTON CORNEAU,
Special Assistant to the Attorney-General.

DECEMBER, 1910.

O

In the Supreme Court of the United States

October Term, 1910.

No. 77

(Originally No. 571, October Term, 1908)

THE UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

CARL S. CHAMBERLIN, D. H. RICE AND TYSON S. DINES, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF WINFIELD SCOTT STRATTON, DECEASED,
Defendant in Error.

On Error to the District Court of the United States for the District of Colorado, Pursuant to a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Brief of Defendants in Error.

STATEMENT

The original proceedings in this case was instituted by the government in the District Court for the District of Colorado, to recover from the executors of the estate of Winfield Scott Stratton, deceased, in an action as for debt, the sum of $4,883.00 and interest, which sum, it is

alleged, is the value of additional revenue stamps that should have been placed upon a deed to certain mining property made by the decedent during his lifetime, and during the existence of the War Revenue Act approved June 13, 1898. The instrument recited a consideration for the property conveyed of $4,850.00, and in accordance with said recited consideration stamps of the value of $4,850 were attached thereto and duly cancelled. It is alleged that the true value of the property was $9,733,000, and that stamps of the value of $4,883 should have been placed on said instrument in addition to those that were actually attached thereto. The District Court sustained a demurrer to the complaint, and this judgment was sustained by the Circuit Court of Appeals, and these decisions are before this Court for review. Succinctly stated, the question for this Court to determine is whether under the circumstances above set forth, an action as for debt is maintained by the government.

The provisions of the Act requiring stamps were repealed prior to the institution of this action.

POINTS AND AUTHORITIES:

1. That part of the Act of June 13, 1898, requiring stamps on deeds does not create a liability authorizing an action of debt against one failing to comply with its requirements.

Lane County v. Oregon, 7 Wall. 71 (1868).
Meriwether v. Garrett, 12 Otto 472 (1880).
Crabtree v. Madden, 54 Fed. 426 (1893).
Fleshman v. McClain, 105 Fed. 610 (1900).
McClain v. Fleshman, 106 Fed. 880 (1901).
United States v. Chamberlin, 156 Fed. 881 (1907).

2. The remedies and penalties prescribed by said part of said Act for a violation thereof are exclusive.

Meriwether v. Garret, *supra.*
United States v. Truck's Admr. 27 Fed. 541 (1886).
United States v. Truck's Admr., 28 Fed. 846 (1886).
McClain v. Fleshman, *supra.*
Craft v. Schafer, 153 Fed. 175 (1807).
United States v. Chamberlin, *supra.*
Thompson v. Allen County, 115 U. S. 550 (1885).
Barkley v. Levee Comrs., 3 Otto 258.
Heine v. Board of Comrs., 19 Wall. 655.

3. Section 31 of said Act does not apply. Even if it be conceded it does apply, no statute giving the right asserted is available.

4. The repeal of the requirements of the Act that deeds should be stamped, did not abate the penalty prescribed for a violation thereof. The government is no more remediless since the repeal than it was before.

Sackett v. McCaffrey, 131- Fed. 219 (1904).

ARGUMENT.

The labors of the circuit judges before whom the case came on for hearing, resulting in the opinion of the court and the dissenting opinion of one member thereof, reported in 156 Federal at page 881, and set out in full at pages 19 to 39 of the printed record, leave little labor for either party to this controversy to perform to present the questions involved and the authorities bearing thereon to this Court. The opinion comprehensively and lucidly presents our side of the controversy, and the dissenting opinion serves equally well the requirements of of the government.

The defendants in error claim that the Act of Congress in question imposed a stamp tax; that under the said Act, and particularly in view of the absence of a statutory provision to that effect, said tax was not a debt;

that the penalties prescribed by said Act were, and were intended to be, exclusive remedies for its violation; and that the action is not maintainable under either the statute or the common law, or otherwise, or at all.

The Act did not provide for, nor did it contemplate, direct payment of a tax on deeds or other documents. It expressly required every document coming within its purview to have upon it internal revenue stamps which the Commissioner of Internal Revenue was required by said Act to "cause to be prepared for the payment of the taxes prescribed." It was clearly contemplated that the question of compliance with the Act should be determined by an inspection and examination of the document itself to ascertain whether or not attached thereto were sufficient stamps. A payment to the Commissioner of the face value of the stamps required by the Act to be attached to a document would not comply with the Act, any more than a payment of two cents to a postmaster would entitle a letter to be carried through the mail unstamped.

The purpose of the Act was to raise revenue and the sale of stamps was doubtless adopted as a convenient method of collecting this revenue both to the government and to the purchaser of the stamps. The facts that Congress provided no other method for payment, and that compliance with the Act was impossible except by purchasing stamps and attaching them to the documents, are evident from a perusal of the Act. The reasons therefor were sufficient to Congress, and it is immaterial what the judicial or executive branch of the government may think of them. There was nothing in the Act requiring a document to be exhibited before the necessary stamps could be purchased; there was nothing prohibiting stamps being kept on hand to be used when occasion should require, exactly as postage stamps are customarily kept. In fact this latter feature was encouraged with reference to certain

kinds of stamps by allowing a discount when purchased in quantities. The penalties prescribed were all for failure to properly attach the required stamps or for failure of the document to have stamps attached to it. That portion of the Act in question will be read in vain for any intimation, direct or indirect, that any failure to purchase stamps, or to pay the face value thereof, was prohibited; every part of the Act speaks of persons attaching or failing to attach stamps, or of documents to which stamps are, or are not, attached. The legislative intent to require the use of stamps and to punish the failure to use them, rather than to require the payment of money, seems clear beyond any question and precludes any contention that the collection of money in lieu of the use of stamps was authorized by the Act.

The government instituted this action to collect the face value of stamps alleged to have been omitted from the document described in the complaint. We construe it to be an action of *indebitatus assumpsit*. The form of the action precludes it from being for liquidated damages for loss of sale of stamps by the government. It is difficult to believe that without any statutory authority therefor, the action can be considered to be to recover a fine or to enforce a penalty. We are, therefore, driven to our construction of the nature of the action by the doctrine of exclusion as well as by the allegations of the complaint, and, indeed, from the authorities on which the government has relied in the previous hearings on the demurrer, it agrees with us in our construction of the nature of the action.

In the absence of a statute making a tax a debt, or authorizing a suit to recover the amount thereof, it has been held generally that it is not of that nature and that no such remedy is available. The cases hereinafter referred to will show that this court has expressed appar-

ently conflicting opinions on this question, but the opinions that hold that a tax may be a debt were rendered upon records differing in vital respects from the one now under consideration.

In Lane County v. Oregon, 7 Wall. 71 (1868), the court had before it for determination the question whether a state tax was a debt, within the meaning of the Act of Congress making United States notes legal tender in payment of all debts, public and private, within the United States, except duties on imports. In conisdering the meaning of the word "debts" as used in said Act, the court said:

> "What, then, is its true sense? The most obvious, and, as it seems to us, the most rational answer to this question is that Congress must have had in contemplation debts originating in contract or demands carried into judgment, and only debts of this character. This is the commonest and most natural use of the word. Some strain is felt upon the understanding when an attempt is made to extend it so as to include taxes imposed by legislative authority, and there should be no such strain in the interpretation of a law like this. We are the more ready to adopt this view, because the greatest of English elementary writers upon law, when treating of debts in their various descriptions, gives no hint that taxes come within either (2 Bl. Com., 475, 476); while American state courts of the highest authority have refused to treat liabilities for taxes as debts, in the ordinary sense of that word, for which actions of debt may be maintained."

The court then cites and quotes from the following cases: Pierce v. Boston, 3 Met. 520; Shaw v. Pickett, 26 Vt. 486; and Camden v. Allen, 2 Dutch, 398, in each of which it is expressly declared that taxes are not debts in the common understanding of the word.

This doctrine was approved in Meriwether v. Garrett, 12 Otto, 472 (1880), which is one of the Memphis receivership cases. There, in considering the matter of collection of unpaid municipal taxes, the court said:

> "Taxes are not debts. It was so held by this court in the case of Lane Co. v. Oregon, reported in 7th Wallace, 71. Debts are obligations for the payment of money founded upon contract express or implied. Taxes are imposts levied for the support of the government or for some special purpose authorized by it. The consent of the taxpayer is not necessary to their enforcement. They operate *in invitum*."

In Crabtree v. Madden, 54 Fed. 426 (1893), the Circuit Court of Appeals for the Eighth Circuit considered the right of the United States Court for Indian Territory to entertain an action for the collection of taxes imposed by the laws of the Creek tribe of Indians upon citizens residing in that Territory, and in sustaining a demurrer to the complaint the court, among other things, said:

> "The counsel for plaintiffs attempts to escape from this conclusion by the argument that the tax is a debt; that it arises upon an implied contract; that the court has jurisdiction to enforce such contracts, and hence of this action. This proposition is not tenable. Taxes are not debts. They do not rest upon contract express or implied. They are imposed by the legislative authority without the consent and against the will of the persons taxed, to maintain the government, protect the rights and privileges of its subjects, or to accomplish some authorized, special purpose. They do not draw interest, are not subject to set-off, and do not depend for

their existence or enforcement upon the individual assent of the taxpayers."

The decisions on which the government chiefly relies to support its contention to the contrary are Meredith v. United States, 13 Peters, 486 (1839), and The Dollar Savings Bank v. United States, 19 Wallace, 227 (1873). Though other cases are cited in the brief of the government, filed in teh Circuit Court of Appeals, they are not decisions of this court, and are relatively unimportant.

The Meredith case was a suit brought to recover from defendants, as assignees in insolvency of certain importers who, prior to their assignment, had failed to pay certain customs duties levied upon imported goods, of which they had obtained possession after giving bond. The court upheld the right to maintain an action in assumpsit, and used the following language:

"The first question is, whether Smith and Buchanan were personally indebted for these duties; or, in other words, whether the importers of goods do, in virtue of the importation thereof, become personally indebted to the United States for the duties due thereon; or the remedy of the United States is exclusively confined to the lien on the goods and the security of the bond given for the duties. It appears to us clear upon principle, as well as upon the obvious import of the provisions of the various acts of Congress on this subject, that the duties due upon all goods imported constitute a personal debt due to the United States from the importer (and the consignee for this purpose is treated as the owner and importer) independently of any lien on the goods, and any bond given for the duties. . . . Now, in the exposition of statutes, laying *duties*, it has been a common rule of interpretation derived from the principles of

the common law that where the duty is charged on the goods, the meaning is that it is a personal charge on the owner by reason of the goods. . . . Nor is there anything new in this doctrine; for it has long been held that in all such cases an action of debt lies in favor of the government against the importer for the duties whenever by accident, mistake or fraud, no duties, or short duties have been paid."

The basis of this decision seems to be that the importation of merchandise, and the levy of import duties on goods imported, create a personal charge against the owner of the goods; create a debt due to the United States; and that by reason of this principle the United States has a right to sue at common law for the collection of the debt. In the case of customs due upon imported goods the collector is required to collect the money, and if it is not paid a lien is given upon the goods. The beginning and end of the duty laid by the Act of 1898 upon the grantor in a deed was the affixing of stamps. He was not required to pay a tax in dollars and cents, *ad valorem* or otherwise. The tax was laid not upon the individual, but upon the instrument itself. In the case of an inporter, the entire duty could be paid at any time in cash, but as hereinbefore stated the payment of money would not satisfy the requirements of the Act in question.

In the Dollar Savings Bank case an action of debt was brought against a savings institution to recover taxes alleged to be due upon accumulated earnings carried to the contingent fund. The right to maintain the action was upheld by the court solely on the ground that inasmuch as the revenue act under which the tax was payable did not prohibit such a suit, the government under powers analogous to those of the King of England, in his capacity of *parens patriae,* or universal trustee, could resort to any

common law remedy available for the collection of government dues.

That there is some conflict between the language used in the cases herein cited must be admtited. Its existence is expressly recognized by Mr. Justice Miller in United States v. Pacific R. R. Co., 4 Dillon 66 (Fed. Cas. No. 15,983), in which, after commenting upon the Lane County and the Dollar Savings Bank cases, he says:

> "I state these things merely to show the difference of opinion that has existed upon the subject, and also to show the fact that the Supreme Court has under one set of circumstances recognized that a tax is a debt, while under another that it was not a debt."

In determining which line of decisions most correctly states the general law, as well as which is most applicable to the statute involved in the case at bar, the following facts are pertinent: (a) The latest utterance of the court is found in the Meriwether case, and by necessary inference the preceding contradictory opinions are thereby overruled. (b) In neither of the cases in which the right to recover as for debt was sustained, did the statute levying the tax require more than the payment of money, nor did it contain any requirements in any way similar to those of the statute now under consiedration relating to the use of stamps. (c) In neither of said cases is it held that, in the absence of statute so declaring it, all taxes levied under Acts of Congress are debts that may be recovered in an action in assumpsit. The most that can be claimed for these decisions is that they held that an action of debt was maintainable to collect certain taxes required to be paid in money only by the statutes authorizing their collection, although such right of action was not conferred by said statutes. Stated another way, these decisions may be said to hold that the remedies pro-

vided by the statutes then before the court were not exclusive, and this brings us to a consideration of that same question under the statute involved in the present case, the determination of which question is probably, though not necessarily, decisive of this case. Are the remedies and penalties prescribed by the war revenue act of June 13, 1898, relating to stamping documents, exclusive? Before setting forth our answer and its reasons, an examination of these provisions is important. The Act contains the following provisions:

> Section 7. "That if any person or persons shall make, sign or issue, or cause to be made, signed or issued, any instrument, document or paper of any kind or description whatsoever, without the same being duly stamped for denoting the tax hereby imposed thereon, or without having thereupon an adhesive stamp to denote said tax, such person or persons shall be deemed guilty of a misdemeanor, and upon convoiction thereof shall pay a fine of not more than one hundred dollars, at the discretion of the court, and such instrument, document or paper, as aforesaid, shall not be competent evidence in any court."
>
> Section 13. "That any person or persons who shall register, issue, sell or transfer, or who shall cause to be issued, registered, sold or transferred, any instrument, document or paper of any kind or description whatsoever mentioned in Schedule A of this act, without the same being duly stamped, or having thereupon an adhesive stamp for denoting the tax chargeable theron, and cancelled in the manner required by law, with intent to evade the provisions of this act, shall be deemed guilty of a misdemeanor, and upon conviction therof shall be punished by a

fine not exceeding fifty dollars, or by *imprisonment not exceeding* six months, or both, in the discretion of the court; and such instrument, document or paper, not being stamped according to law, shall *be deemed invalid and of no effort.*"

Section 14. "That hereafter no instrument, paper or document required by law to be stamped, which has been signed or issued without being duly stamped, or with a deficient stamp, nor any copy thereof, *shall be recorded or admitted, or used as evidence in any court until a legal stamp or stamps,* denoting the amount of tax, shall have been affixed thereto as prescribed by law; *Provided,* That any bonds, debenture, certificate of stock or certificate of indebtedness issued in any foreign country shall pay the same tax as is required by law on similar instruments when issued, sold or transferred in the United States; and the party to whom the same is issued, or by whom it is sold or transferred, shall, before selling or transferring the same, affix thereon the stamp or stamps indicating the tax required."

Section 15. "That it shall not be lawful to record or register an instrument, paper or document required by law to be stamped unless a stamp or stamps of the proper amount shall have been affixed and cancelled in the manner prescribed by law; and the record, registry or transfer of any such instrument supon which the proper stamp or stamps aforesaid shall not have been affixed and cancelled as aforesaid shall not be used in evidence."

It surely cannot be contended that Congress was not diligent in providing remedies and prescribing penalties for a failure to comply with the requirements of the statute, but it is significant that all the preceding sections

relate not to a failure to *pay a tax*, but to a failure to *affix a stamp*, thereby strongly indicating that the legislative intent was to compel the use of stamps. If, in answer, it is said that this was but another means of requiring the payment of a tax, we reply that the purchase and cancellation or destruction of the stamps without affixing them to the document required to be stamped, would not have saved a vender or his deed from the penalties prescribed. The sections above quoted show that Congress not only had in mind remedies and penalties, but also that it made ampe provision therefor. The *person* vioating the statute is first guilty of a misdemeanor punishable by a fine not exceeding $100, and is next made guilty of a misdemeanor punishable by a fine not exceeding $50 or by imprisonment not exceeding six months, or by both fine and imprisonment. The unstamped or insufficiently stamped *instrument* is first made incompetent to be introduced in evidence in court; next, it is made invalid and of no effect; next, it is prohibited from being recorded; and, finally, the record of it is made inadmissible in evidence. To take a statute so full of remedies and penalties and to insert an additional one, goes further than to supply redress for a wrong; it in effect requires that judicial branch of the government to legislate on a matter of remedy that has not been overlooked by the legislative body, but on the contrary has been so amply covered by that body as to preclude any suspicion that it was not fully considered. The Circuit Court of Appeals that handed down the decision which is before this court for consideration is not the only court that has decided that the penalties prescribed in the Act in question are exclusive. In Fleshman v. McClain, 105 Fed. 610, a Collector of Internal Revenue had compelled the payment under threat of suits, of the value of stamps that he claimed should have been placed on certain documents by the plaintiff. Suit was brought against

the Collector to recover back the money so paid. The court held that, even if plaintiff had violated the law, yet the Collector had no right to demand of him payment in cash, and overruled a demurrer to the complaint. The case was taken up on error to the Circuit Court of Appeals for the Third Circuit, where the decision of the lower court was upheld and affirmed, and the following language from the opinion of the lower court was quoted and expressly approved:

> "Assuming the government's position to be correct—that each of the plaintiff's transactions, to be complete, should have embraced a written contract to resell, duly executed, stamped and delivered—and assuming further, that the war revenue act was violated because such contracts were not executed and stamped, the question still remains, did such violation authorize the collector to demand from the plaintiff a sum of money in cash? As it seems to me, this question must be answered in the negative. The taxes under consideration are stamp taxes upon certain agreements, and taxes of this kind are not sums of money assessed annually, or for any other period, against either the citizen or his property. The remedies ordinarily used for the collection of such sums are not available to enforce the use of stamps under the war revenue act, because these remedies are not given by the statute, and are not implied from the nature of the citizen's obligation. Stamp taxes upon agreements are charges by way of excise, and the government collects the charge by selling the necessary stamps, and requiring them to be affixed to the material evidence of the contract. If this requirement is disobeyed, the statutory punishment is fine or imprisonment, coupled with the suspension of the evi-

dential value of the written instrument; but nowhere in the act is there to be found any provision empowering a collector to distrain, or sue for, or collect in any other manner the money that ought to have been paid to the government for the stamps that were not used. Not being provided for by the statute, the course pursued by the defendant—demanding and collecting cash under threat of suit—was without authority, and the exaction was therefore unlawful. Congress possessed the sole power to authorize this tax, and the sole power to prescribe the means by which it should be collected. Meriwether v. Garrett, 102 U. S. 515, 26 L. Ed. 197. No remedy by suit is given or implied by the act in question, nor is there to be discovered any authority to demand and accept money in lieu of the stamps that are required by law to be affixed."

No other decisions involving a consideration of the question here presented, under this particular statute, have been brought to our attention, but there is ample authority in the decisions of various Federal Courts to sustain the principles on which the decisions of the Circuit Court of Appeals for both the third and the eighth circuits are based.

In Craft v. Schafer, 153 Fed .175 (1907), which was a suit against an Internal Revenue Collector to recover back penalties enforced under supposed authority of Section 3176 of the Revised Statutes for violation of the Oleomargarine Acts, the Circuit Court of Appeals for the Sixth Circuit, in holding that the provisions of said section were not applicable, said at page 176:

"There is only one question for consideration, namely, whether this section applied, so as to authorize the assessment of the penalty mentioned. The court below held it did not, and in this conclusion we

concur. The oleomargarine acts are complete in themselves. They either contain provisions of their own for the enforcement of the tax, or they incorporate such sections of the internal revenue laws as Congress thought ought to be applicable. Section 3176 of the Revised Statutes was not one of these sections or Congress would have said so, making it applicable to the enforcement of the oleomargarine tax."

The reason for denying the right to different penalties than those prescribed by statute is as strong with reference to the Spanish War Act as to the Oleomargarine Act.

In United States v. Truck's Admr., 27 Fed. 541 (1886), an action was brought in the District Court against an administrator to recover a tax levied for the benefit of the government on legacies and successions. The statute authorized a suit to recover the tax against the person in possession of the decedent's property, and at the time of the bringing of the action the administrator had distributed the asets of the estate. The court held the action not maintainable, inasmuch as the statute provided a remedy, and this remedy had not been invoked. The case went up on eror and the circuit court, in 28 Fed. 846, affirmed the decision of the lower court, and in so doing said:

"The only question which it is necessary to consider is the primary one, can the United States, in view of the provisions of the act of Congress imposing the tax claimed, maintain an action at common law to recover it from the defendant? It was decided by the court below that it could not. It is a rule of the common law, that where a statute creates a right, and provides a particular remedy for its enforcement, the remedy is generally exclusive of all common-law

remedies. But it has been held that this rule is not applicable to the United States, unless it is expressly made so by the statute under which the claim is made. Savings Bank v. U. S., 19 Wall. 237. By the act of 1862, and its supplements and substitutes a tax was imposed upon successions. This tax was made a lien or charge upon the property bequeathed or to be distributed, and it was made the duty of the executor, administrator, or trustee to pay it; and, in case of his refusal or neglect to pay it, it is provided that 'proceedings shall be commenced before any court of the United States, in the name of the United States, against such person or persons as may have the actual or constructive custody or possession of such personal estate or property, or any part thereof; and shall subject such property or personal estate, or any portion of the same, to be sold upon the judgment or decree of such court.'

"The language of the act is imperative that this remedy shall be pursued if payment of the tax is not made, and that it shall be in the name of the United States. This could not be expressed in clearer or more explicit language. If it is plain, then, that congress intended that the proceedings prescribed by the statute should be the remedy pursued by the United States when the tax was not paid, then the common-law rule above stated applies, and a common-law action cannot be maintained."

In Meriwether v. Garrett, *supra*, the court expresses the general principles underlying our contention in the following language:—

"The levying of taxes is not a judicial act. It has no element of one. It is a high act of sovereignty to be performed ony by the Legislature upon consid-

erations of policy, necessity and public welfare. In the distribution of the powers of government in this country into three departments, the power of taxation falls to the legislative. It belongs to that department to determine what measures shall be taken for the public welfare, and to provide the revenues for the support and due administration of the government throughout the State and all its subdivisions. Having the sole power to authorize the tax, it must equally possess the sole power to prescribe the means by which the tax shall be collected, and to designate the officers through whom it shall be enforced."

This court has also held that where remedies for the levy and collection of taxes have been provided by statute, the courts will not create or supply a new or additional remedy even though the statutory remedy under the circumstances of the particular case, is wholly ineffectual.

Thompson v. Allen County, 115 U. S. 550;
Barkeley v. Levee Comrs., 3 Otto, 258.
Heine v. Board of Comrs., 19 Wall. 655.

The government in the hearings in the courts below has laid much stress upon section 31 of the Act, which provides as follows:—

"That all administrative, special or stamp provisions of law, including the laws in relation to the assessment of taxes not heretofore specifically repealed, are hereby made applicable to this act."

Under this provision the government seeks to invoke the aid of Section 3213 of the Revised Statutes, which is as follows:—

"It shall be the duty of the collectors, in their respective districts, subject to the provisions of this title, to prosecute for the recovery of any sums which

may be forfeited, all suits for fines, penalties and forfeiture, where not otherwise provided for, shall be brought in the name of the United States, in any proper form of action, or by any appropriate form of proceeding, *qui tam* or otherwise, before any circuit or district court of the United States for the district within which said fine, penalty or forfeiture may have been incurred, or before any other court of competent jurisdiction; and taxes may be sued for and recovered in the name of the United States, in any proper form of action, before any circuit or district court of the United States for the district within which the liability to such tax is incurred, or where the party from whom such tax is due resides at the time of the commencement of the said action."

There are several reasons why neither of these sections is available to sustain the complaint under consideration. In the first place, as pointed out in the opinion of the Circuit Court of Appeals, section 3213 is neither a special law, nor a stamp provision of law. It does not relate to the assessment of taxes, but if it did, it would be inapplicable here. Therefore, if reliance on any remedy it provides may be made under the provisions of section 31, it must be by virtue of relating to an "administrative" provision of law. But we think the contents of section 31 negative any argument that remedies for collection of taxes are intended to be included within the term "administrative." This reason is based largely upon the fact that section 31 expressly refers to "laws in relation to the assessment of taxes," which it would not have done had the legislative intention been to include assessment laws under the head of administrative laws. It seems clear to us, as it seemed to the Circuit Court of

Appeals, that assessment laws come as nearly within the meaning of "administrative" laws, as do collection laws, and since the one class was not intended to be included in said section under the more general term, it follows that the other class was not so intended. It is impossible to suggest any reason, except a deliberate intention of Congress so to do, why assessment laws should be distinctly enumerated, and collection laws should be omitted. The use of the one term in the remedial part of this revenue statute must so obviously have suggested the other to the legislative body, that its omission can not be supplied by a court without doing violence to every rule of statutory construction.

Section 3447 of the Revised Statutes provides that "Whenever the mode or time of *assessing* or *collecting* any tax which is imposed, is not provided for, the Commissioner of Internal Revenue may establish the same by regulation." This shows that Congress recognizes the difference between assessment and collection.

Section 3182 of the Revised Statutes provides that all provisions of law for the ascertainment of liability to any tax or the *assessment* or *collection* thereof shall be held to apply so far as may be necessary. Here, again, the two words are used.

But conceding for argument's sake that section 31 is broad enough to include laws relating to the collection of taxes, the inapplicability of section 3213 in an effort to sustain the present complaint becomes evident upon an analysis of the section on which the government places such great reliance. The first portion of the section authorizes collectors to prosecute for the recovery of any sums which may be forfeited by aw. This evidently has no application to the present suit. The next provisions authorize "all suits for fines, penalties and forfeitures, where not otherwise provided for," to be brought in the

name of the United States in any *proper form* of action, or by any *appropriate* form of proceeding. We do not construe this to be a suit for a fine or for a penalty or for a forfeiture. It surely does not come within the commonly understood meaning of any of these words. But if this provision should be relied upon by the government, what is said hereinafter in considering the next succeeding portion of said statute is equally applicable to this provision, because, for the purposes of our answer, the two provisions are practically identical.

That part of the statute on which we think the government must rely, is the following provision:

> "And taxes may be sued for and recovered in the name of the United States in any *proper* form of action before any circuit or district court of the United States for the district within which the liability to such tax is incurred."

This provision does not create a cause of action. It does not provide that an action of debt will lie to collect the value of stamps improperly absent from a document. It does not convert a tax into a debt. It does not attempt to define the "proper" form of an action or proceeding for violation of a revenue law. The only thing it does is to constitute the United States the proper party to sue in actions properly brought to recover unpaid taxes. The question of proper parties is not riased by the demurrer, and is not before the court. That is the only question in aid of which section 3213 could be invoked. On the record before this court that section merely begs the question of whether the complaint sets forth a proper form of action, and does not directly or remotely assist in arriving at an answer.

For the purpose of showing that Congress treats the collection of a stamp tax in a different way from the col-

lection of duties payable in cash, it is pertinent to call attention to section 3183 of the Revised Statutes which provides as follows:—

> "It shall be the duty of the collectors or their deputies in their respective districts, and they are authorized to collect all the taxes imposed by law, however the same may be designated, and every collector and deputy collector shall give receipts for all sums collected by him, excepting only when the same are in payment for stamps sold and delivered, but no colector or deputy collector shall issue a receipt in lieu of a stamp representing a tax."

There is no change made against any person amenable to the stamp tax as there is made on the books of the government against an importer. The obligation in the one instance is different from that in the other, and it might properly be held that the law would imply the right of the government to bring suit in one case and would deny such right in the other case. The government never meant by the stamp act of 1898 to permit suits to be brought for the collection of taxes alleged to be due by reason of an insufficient use of stamps.

As further persuasive that Congress intended that the remedies and penalties prescribed for a failure to properly stamp documents should be exclusive, we call particular attention to the fact that the Act under consideration bears throughout clear evidence that Congress had in mind the necessity or desirability of providing ample protection to the government for all violations of the Act.

Section 1 imposed an additional tax on alcoholic liquors and at its conclusion provided that the additional tax "shall be assessed and collected in the manner now provided by law for the collection of taxes *not paid by*

stamps." This provision shows three important things, viz.: That Congress recognized that the collection of taxes by stamps, and of those not by stamps, were governed by different laws; that when remedies for both assessment and collection were considered necessary, both were named, thereby emphasizing th omission of "collection" from the provisions of section 31; and that it was engaged in specifcally prescribing means of collecting these taxes.

Section 3 fixed the tax on tobacco, and, among other things, provided that "the Commissioner of Internal Revenue shall assess and collect the taxes found to be due as other taxes *not paid by stamps* are assessed and collected."

Section 4 placed a tax upon tobacco dealers and provided that any person violating the Act "shall, besides being liable to the payment of such special tax, be guilty of a misdemeanor."

Sections 6 to 25, inclusive, related to adhesive stamps of various kinds, required to be placed on drugs, medicines, notes, stock certificates, deeds, etc., and included the provisions under which the deed described in the complaint was required to be stamped. These sections are absolutely full of penalties for every kind of violation or evasion that suggested itself to the Congressional body.

Sections 29 and 30 fixed a tax upon legacies and distributive shares of personal property and provided that, on failure to pay, the collector should commence appropriate proceedings in the name of the United States "against such person or persons as may have the actual or constructive custody or possession of such property or personal estate, or any part thereof, and shall subject such property or personal estate, or any portion of the same, to be sold upon the judgment or decree of such court."

Sections 35 to 49, inclusive, levied a tax upon mixed

flour. Violations of the Act were variously punishable as misdemeanors. In addition, section 41 provided that when the tax levied should not be paid, the Commissioner was required "to estimate the amount of tax which should have been paid, and to make an assessment therefor and certify the same to the collector of the proper district; the tax so assessed shall be *in addition* to the penalties imposed by this Act for an unauthorized sale or removal." Section 46 provided that "all fines, penalties and forfeitures imposed by sections thirty-six to forty-five, both inclusive, of this Act, may be recovered in any court of competent jurisdiction."

Various other remedies were given by the Act, and, in addition, it separately prescribed more than twenty-five penalties for violations of various provisions of the Act. In fact, an examination of the Act will show that more than one-third of its volume is taken up with providing remedies and prescribing penalties. They are so diverse in their nature, so intermingled throughout the Act, so careful in their wording that it seems to us considerable assurance is required to present the contention that Congress did not intend to, or did not in fact, embody such remedies and punitive provisions in the Act as it considered necessary or proper.

Then, too, by bringing this action the government seems to minimize the punitive features of this law. If the allegations of the complaint are true, Mr. Stratton subjected himself to fine and imprisonment, and in addition destroyed for both evidential and recording purposes the evidence of title to $6,733,000.00 worth of property. It is a far fetched argument to contend, even inferentially, that a property owner by subjecting himself to a criminal prosecution, and by the destruction of the evidence of title to $1,000 worth of property for every dollar's worth of stamps of which the government was deprived of the

sale, would not be adequately punished. It is untenable to argue that such penalties are so weak or ineffective as to raise a presumption that they were not intended to be exclusive.

Be it remembered also that if the government should recover in this action, the deed would still remain unstamped. The fact that the Act has been repealed since its alleged infraction does not detract from this argument. That question may be considered now in construing and interpreting the Act, and in determining whether the complaint states a cause of action, just as properly as it could have been conisdered before the Act was repealed.

If it should be suggested that the repeal of the Act left the government remediless, unless an action of this nature is maintainable, the answer is found by inspecting the repealing acts. Neither the repealing act of March 2, 1901, nor that of April 12, 1902, repealed the penalties prescribed against unstamped or improperly stamped deeds, and they remain as much under the ban of the law as though no repealing acts had ever been enacted. This precise question is answered by the Circuit Court of Appeals for the ninth circuit in Sackett v. McCaffrey, 131 Fed. 219 (1904). There a declaration of homestead, executed during the time the Act of 1898 was in effect, but which did not contain the required stamps, was offered in evidence after the repeal of the Act. Objection was made on the ground that it was unstamped and was, therefore, inadmissible. The objection was met with the contention that by the repeal of the Act, the bar had been removed. This contention was upheld by the lower court, but was held untenable by the appellate court, in the following language, at pages 222 and 223:—

> "By the act of March 2, 1901 (31 Stat. 938 c. 806 [U. S. Comp. St. 1901, p. 2286]), the act of June 13, 1898, was amended, and the provision under

consideration relating to stamp taxes on certificates was repealed. Section 7 of the amendatory act (31 Stat. 941 [U. S. Comp. St. 1901, p. 2294]) provides specifically for a continuing law for the stamping of unstamped instruments subject to a stamp tax at the time they were issued, and section 14 of the original act (30 Stat. 455 [U. S. Comp. St. 1901, p. 2296]), providing that unstamped instruments should not be recorded or received in evidence, was not repealed, nor was it repealed by the act of April 12, 1902 (32 Stat. 96, c. 500 [U. S. Comp. St. Supp. 1903, p 276]), which repealed the whole of Schedule A But defendants in error contend that when the law requiring certificates of acknowledgments to be stamped was repealed the penalty for a failure to stamp such certificates could not be enforced. This is not the law, as appears from the provisions of the repealing acts. But, further than this, section 13 of the Revised Statutes (U. S. Comp. St. 1901, p. 6) provides as follows:

"'The repeal of a statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.'

"There can be no question but that the court below was in error in admitting the declaration of homestead in evidence, but we do not wish to be understood as holding that, if the certificate of acknowledgment were now stamped, as provided in section 13 of the act of June 13, 1898, as amended by

Act March 2, 1901, c. 806, 31, Stat. 941 (U. S. Comp. St. 1901, p. 2295), it would not be admissible in evidence on a new trial"

The logic of the government's position is that under this statute it can recover as for debt $4,883, without removing or attempting to remove the ban placed upon the instrument, whereby it is made worthless for all evidential or record purposes. No stamp is tendered for the $4,883 demanded; no alleviation of the heavy penalty is offered.

We are sure that this court will not permit the punishment for an alleged offense to be piled so high upon one another, unless the right to do so is more clearly shown than is possible in this case.

Respectfully submitted,

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